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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1929**

## No. 254

NEW JERSEY BELL TELEPHONE COMPANY,
APPELLANT,

*vs.*

THE STATE BOARD OF TAXES AND ASSESSMENT
OF THE STATE OF NEW JERSEY

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JULY 20, 1929

(34,385)

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# SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1929

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## IN SUPREME COURT OF NEW JERSEY

WRIT OF CERTIORARI

(Allowed June 9, 1928; Returnable June 29, 1928)

NEW JERSEY, ss:

The State of New Jersey to the State Board of Taxes and Assessment, Greeting:

We, being willing, for certain reason (a proper case having been made and due notice of application for this writ having been given to the Attorney-General), to be certified of a certain assessment of taxes for the year 1928 against the New Jersey Bell Telephone Company, made by the State Board of Taxes and Assessment pursuant to an Act of the Legislature of the State of New Jersey entitled (as said title was amended) "An act for the taxation of all the property and franchises of persons, copartnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled 'An Act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in the State,' approved [fol. 2] May twenty-third, one thousand nine hundred and six," approved March 23, 1900, and amended by acts approved March 13, 1917, March 4, 1918 and March 30, 1927, respectively, and supplemented by an act approved March 27, 1928, and known as Chapter 109 of the Laws of 1928:

Do command you, that the said assessment of taxes so made by you, together with all matters touching and concerning the same as fully and entirely as before you they remain, to the Justices of our Supreme Court at Trenton, on the 29th day of June, 1928, you certify and send, together with this writ, that therein may be done what of right and

according to the laws and constitution of this State and of the United States, ought to be done.

Witness William S. Gummere, Esq., Chief Justice, at Trenton, this 9th day of June, 1928.

(Signed) Fred L. Bloodgood, Clerk. Frankland Briggs, Attorney for Prosecutor.

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[fol. 3] IN SUPREME COURT OF NEW JERSEY

NEW JERSEY BELL TELEPHONE COMPANY, Petitioner,

vs.

STATE BOARD OF TAXES AND ASSESSMENT, Defendant

On Certiorari

RETURN OF THE STATE BOARD OF TAXES AND ASSESSMENT—Filed June 26, 1928

The State Board of Taxes and Assessment doth herewith send to the Supreme Court of the State of New Jersey the annual report required by Chapter 195, Laws of 1900, as amended, the certification of the tax, and the proceedings in the matter of the appeal of the New Jersey Bell Telephone Company from the Franchise Tax levied by this Board against this Company for the year 1928 under Chapter 195, Laws of 1900, as amended, as within it is commanded, as by the transcript under the seal of said Board hereto annexed more fully appears.

State Board of Taxes and Assessment, by Chas. E. Cook, Secretary. (Seal.)

The State Board of Taxes and Assessment submits the following schedules concerning the assessment of Franchise Taxes for the year 1928 against the prosecutor, under [fol. 4] the provisions of Chapter 195, Laws of 1900, as amended:

Schedule

1. Copies—Company's Annual Report to Board.
2. Copies—Correspondence concerning the question of Gross Receipts.

Schedule

3. Memorandum—Showing calculation of Taxable Gross Receipts and Franchise Tax.
4. Memorandum—Showing valuation of personal property on public highways, as reported by local assessors for purposes of apportionment of Franchise Tax.
5. Apportionment sheet, showing the calculation of Franchise Tax and the apportionment of tax.
6. Copy—Certificate of apportionment to the Company showing amounts due the taxing districts in which Company operates.

All of which is respectfully submitted.
State Board of Taxes and Assessment, by Chas E. Cook, Secretary.

Trenton, New Jersey, June 26, 1928.

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[fol. 5] SCHEDULE 1 TO RETURN

Received Feb. 1, 1928

Two copies of this report are sent, retain one for your own use, the other file with this Department, on or before February first next.

Telegraph and Telephone Companies

Report of the New Jersey Bell Telephone Company

Chester I. Barnard President.
Stephen C. Ormsbee Treasurer.
Stephen C. Ormsbee Secretary.
Date of Incorporation: August 12, 1904.
Principal Office in New Jersey: City or Town: Newark.
Street and Number: 1060 South Broad St.
Name of Agent in Charge: Frankland Briggs.
The gross receipts of the Association or corporation making this report for business done over its whole line, for the year ending December 31, 1927, are $11,742,764.87.
The length of its whole line is 15,203 miles.

The length of its lines along any street, highway, road, lane, or other public place in the State of New Jersey is 8,403 miles.

The gross receipts of said Association or Corporation in New Jersey, for the year ending December 31, 1927, taxable under provisions of the aforesaid act, are $6,490,226.14.

The following statement shows location and length of lines in, upon or under any public street, road, highway, [fol. 6] lane or other public place in the State of New Jersey.

Tax, @ —, $—.

The lines of this company extend in all directions over and under public and private ways and places in approximately 550 taxing districts in the State of New Jersey. The records of this company will not permit of a division of the mileage of line as between municipalities or taxing districts, and as to mileage on the public streets, roads, highways, lanes, etc. It is therefore impossible to furnish the information required by this portion of the form.

STATE OF NEW JERSEY,
Essex County, ss:

Stephen C. Ormsbee being duly sworn according to law, on his oath says that he is the Treasurer of the New Jersey Bell Telephone Company, and that the foregoing report and statements are correct and true, to the best of his knowledge and belief.

(Signed) Stephen C. Ormsbee.

Address: 1060 South Broad St., Newark, N. J.

Sworn and subscribed before me this first day of February A. D. 1928. Evelyn G. Madden, Notary Public, Essex County. My commission expires October 6, 1932.

[fol. 7] Received Feb. 2, 1928

Two copies of this report are sent, retain one for your own use, the other file with this Department, on or before February first next.

Telegraph and Telephone Companies

Report of the New York Telephone Co.

New York Telephone Company, Legal Department, 140 West Street, New York, N. Y.

N. H. Egleston, Tax Attorney

January 31st, 1928.

Mr. Charles E. Cook, Secretary State Board of Taxes and Assessment, Trenton, New Jersey.

Dear Sir: Inasmuch as New York Telephone Company is not occupying and since September 30th, 1927 has not occupied any of the streets, highways, roads, lanes or public places in the State of New Jersey, it is not during the year 1928 subject to the franchise tax imposed by Chapter 195, Laws of 1900, as amended. It, therefore, will not file with your Board any report of gross receipts for the year ending December 31st, 1927.

Very truly yours, (Signed) N. H. Egleston, Tax Attorney.

NHE—W.

[fol. 8] Received Mar. 12, 1928

Two copies of this report are sent, retain one for your own use, the other file with this Department, on or before February first next.

Telegraph and Telephone Companies

Supplemental Report of the New Jersey Bell Telephone Company

Chester I. Barnard, President.
Stephen C. Ormsbee, Treasurer.
Stephen C. Ormsbee, Secretary.
Date of Incorporation: August 12, 1904.
Principal Office in New Jersey: City or Town: Newark; Street and Number: 1060 South Broad St.
Name of Agent in Charge: Frankland Briggs.

The gross receipts of the Association or Corporation making this report for business done over its whole line, for the year ending December 31, 1927, are $3,535,020.81.

The length of its whole line is 15,203 miles.

The length of its lines along any street, highway, road, lane, or other public place in the State of New Jersey is 8,403 miles.

The gross receipts if any of said Association or Corporation in New Jersey, for the year ending December 31, 1927, taxable under provisions of the aforesaid act, are $1,953,-806.00.

The following statement shows location and length of lines in, upon or under any public street, road, highway, lane or other public place in the State of New Jersey.

Tax, @ —, $—.

[fol. 9] This report supplements the report made by this company and filed with the State Board of Taxes and Assessment of New Jersey February 1, 1928, and is made at the demand of said State Board.

This report is made and filed under protest for the reasons that the gross receipts herewith submitted are those derived solely from its interstate business and are not the proper legal basis of a tax to be levied and assessed under the provisions of Chapter 195, P. L. 1900, as amended; that the State of New Jersey is without legal authority to assess or levy a tax which is based in whole or in part upon such receipts.

State of New Jersey,
Essex County, ss:

Stephen C. Ormsbee being duly sworn according to law, on his oath says that he is the Treasurer of the New Jersey Bell Telephone Company, and that the foregoing report and statements are correct and true, to the best of his knowledge and belief.

(Signed) Stephen C. Ormsbee.

Address: 1060 South Broad St., Newark, N. J.

Sworn and subscribed before me this third day of March, A. D. 1928. Evelyn G. Madden, Notary Public, Essex County. My commission expires October 6, 1932.

[fol. 10] Received Apr. 10, 1928

Two copies of this report are sent, retain one for your own use, the other file with this Department, on or before February first next.

Telegraph and Telephone Companies

Report of the New Jersey Bell Telephone Company

Chester I. Barnard, President.
Stephen C. Ormsbee, Treasurer.
Stephen C. Ormsbee, Secretary.
Date of Incorporation: August 12, 1904.
Principal Office in New Jersey: City or Town: Newark; Street and Number: 1060 South Broad St.
Name of Agent in Charge: Frankland Briggs.

Report of the New Jersey Bell Telephone Company of the gross receipts of the New York Telephone Company from January 1st, 1927 to October 1st, 1927, the date of the acquisition of the rights, property and franchises of the New York Telephone Company by the said New Jersey Bell Telephone Company, made in accordance with the provisions of Chapter 109 of the Laws of 1928.

The gross receipts of the New York Telephone Company for business done over its whole line for the period from January 1, 1927 to October 1, 1927 are:

| | |
|---|---|
| Receipts derived from intra-state business | $19,103,675.59 |
| Receipts derived from inter-state business | 5,898,870.78 |
| Total gross receipts | $25,002,546.37 |

The length of its whole line is 10,829 miles.

[fol. 11] The length of its lines along any street, highway, road, lane, or other public place in the State of New Jersey is 5,516 miles.

The gross receipts of said New York Telephone Company for the period from January 1, 1927 to October 1, 1927 taxable under the provisions of the act aforesaid are:

| | |
|---|---|
| Receipts derived from intra-state business | $9,731,412.35 |
| Receipts derived from inter-state business | 3,004,884.77 |
| Total | $12,736,297.12 |

Tax at —, $—.

This report is made and filed under protest, for the reason that a portion of the gross receipts herein reported are derived solely from interstate business and are not the proper legal or constitutional basis of a tax to be levied and assessed under the provisions of Chapter 195, P. L. 1900, as amended, and Chapter 109, P. L. 1928.

State of New Jersey,
Essex County, ss:

Stephen C. Ormsbee being duly sworn according to law, on his oath says that he is the Treasurer of the New Jersey Bell Telephone Company, and that the foregoing report and statements are correct and true, to the best of his knowledge and belief.

(Signed) Stephen C. Ormsbee.

Address: 1060 South Broad St., Newark, N. J.

Sworn and subscribed before me this ninth day of April, A. D. 1928. Evelyn G. Madden, Notary Public, Essex County. My commission expires October 6, 1932.

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[fol. 12] Schedule 2 to Return

New Jersey Bell Telephone Company, 1060 Broad Street

Frankland Briggs, Vice President and General Counsel.
Leonard A. Sweney, Tax Attorney

Newark, N. J., February 6, 1928.

State Board of Taxes and Assessment, Charles E. Cook, Secretary, State House, Trenton, N. J.

Gentlemen: Complying with your Mr. Cogill's verbal request for information in connection with the gross receipts report of the New Jersey Bell Telephone Company made in compliance with Chapter 195, P. L. 1900, as amended, and filed with your board on the first instant, I would advise that in arriving at the total gross receipts

($11,742,764.87) shown on the report, the receipts of the New York Telephone Company for its nine months' operation of the lines in the northern and central areas during the year 1927 have been omitted. Our reasons for this omission are that the act requires the corporation reporting to report its gross receipts. The tax, by the decisions of our courts, is not a property tax, but a franchise or excise tax, and therefore properly a corporate tax. The New Jersey Bell Telephone Company is not the corporate successor of the New York Telephone Company, but, by purchase, succeeds only to the property interests of that company in and as to the physical properties acquired.

[fol. 13] The receipts of the New York Company during the first nine months of 1927 are not and cannot be considered as the receipts of the New Jersey Company. In fact, no part of the income of the New York Company came into the treasury of the New Jersey Company. Further, under the decision in the case of the New York and New Jersey Water Company v. Assessors, 88 N. J. L. 595, affirmed in 90 N. J. L. 537, the tax is a current tax and in the present instance is for the year 1928, and the basis for the tax is the situation as of December 31, 1927. We have reported the entire gross receipts of the New Jersey Company as of that date, with the exception of the receipts derived from interstate business. We feel that as to the nine months of operation by the New York Company we have complied with the terms and the meaning of the act.

We have not included in the total amount of gross receipts that portion of those receipts derived from interstate business. Our theory upon this phase of the matter is that a tax based in whole or in part on such receipts is a burden upon interstate commerce and therefore in violation of the commerce clause of the Federal Constitution.

These matters were discussed with Mr. Cogill, who, I am sure, will explain to you fully our position.

In connection with your letter of February 2, I will furnish the information therein requested at the earliest possible date.

Respectfully (Signed) L. A. Sweney, Tax Attorney.

LAS HSM.

[fol. 14] State of New Jersey State Board of Taxes and Assessment

Trenton, N. J., Feb. 29, 1928.

In re "New Jersey Bell Telephone Co."

Mr. Leonard A. Sweney, Tax Attorney, 1060 Broad Street, Newark, N. J.

DEAR MR. SWENEY: I am directed to advise you that the Report filed by the above named Corporation with this Department on February 1, 1928, is not satisfactory, inasmuch as the gross receipts reported are those which represent the amount of intrastate business only.

We must ask that you file a corrected Report at once for the period ending December 31, 1927, which will show the receipts, both interstate and intrastate, of the above named Corporation, which would include those of the Delaware & Atlantic Telegraph & Telephone Company, up to the time of its change of name to the New Jersey Bell Telephone Company, for which purpose additional blank forms are enclosed herewith.

In making this request, we wish to be understood that we in no way waive our right to a Report which will show the amount of gross receipts of the New York Telephone Company up to the time it was taken over by the New Jersey Bell Telephone Company.

Thanking you in advance for prompt attention, we remain

(Signed) Very truly yours, Chas. E. Cook, Secretary.
JHC/L.

[fol. 15] New Jersey Bell Telephone Company, 1060 Broad Street

Frankland Briggs, Vice President and General Counsel.
Leonard A. Sweney, Tax Attorney

Newark, N. J., March 5, 1928.

State Board of Taxes and Assessment, Charles E. Cook, Secretary, State House, Trenton, N. J.

GENTLEMEN: Receipt is hereby acknowledged of your letter of the 29th ult., in conection with the gross receipts re-

port of this company filed with your board on February 1st, 1928, under the provisions of Chapter 195, P. L. 1900, as amended.

Complying with the request therein contained, there is enclosed herewith a supplemental report, showing the interstate receipts of the New Jersey Bell Telephone Company for the year ending December 31st, 1927, which receipts include those of the Delaware and Atlantic Telegraph and Telephone Company for the first nine months, and those of this company for the last three months of 1927.

This report, it is to be understood, is filed under protest, it being the contention of this company that the State of New Jersey is without legal authority to levy a tax based in whole or in part upon receipts derived from interstate business, and that interstate receipts are not the proper basis of a tax to be assessed under the provisions of Chapter 195, P. L. 1900, as amended.

It is understood that this Company, by the filing of this or any other report, in no way waives its right to attack [fol. 16] any tax levied or to be levied or assessed by the State against it which may include as a basis of the tax that portion of its gross receipts derived from interstate business.

Very truly yours, (Signed) Leonard A. Sweney, Tax Attorney.

LAS. HSM.

State of New Jersey, State Board of Taxes and Assessment

Trenton, N. J., March 31, 1928.

New Jersey Bell Telephone Company, Leonard A. Sweney, Esq., 1060 Broad St., Newark, N. J.

Dear Sir: The Board directs me to inform you that under Chapter 109, Laws of 1928, copy of which is enclosed, you are required to report to this Board the gross receipts of the New York Telephone Company, from January 1, 1927 to the date of the acquisition of this company by the New Jersey Bell Telephone Company.

A blank form for this purpose is enclosed.

Your prompt attention to this matter is requested, in order that the work of computing and apportioning the

gross receipts and franchise taxes for this year, by this Department, may not be further delayed.

Very truly yours, (Signed) Chas. E. Cook, Secretary.

[fol. 17] New Jersey Bell Telephone Company, 1060 Broad Street

Frankland Briggs, Vice President and General Counsel.
Leonard A. Sweney, Tax Attorney

Newark, N. J., April 9, 1928.

State Board of Taxes and Assessment, Charles E. Cook, Secretary, State House, Trenton, N. J.

Dear Sir: I enclose herewith the report of the New Jersey Bell Telephone Company of the gross receipts of the New York Telephone Company for the period from January 1, 1927 to October 1, 1927, the date of the acquisition of the rights, property and franchises of the New York Telephone Company by this reporting company, which report is made in accordance with the provisions of Chapter 109, Laws of 1928, and requested by your letter of the 31st ult.

It is to be understood that this report is filed under protest, for the reason that a portion of the gross receipts herein reported are derived solely from interstate business and are not the proper legal or constitutional basis of a tax to be levied and assessed under the provisions of Chapter 195, P. L. 1900, as amended, and Chapter 109, P. L. 1928.

As in the case of the supplemental report dated March 3, 1928 and enclosed with my letter of March 5, it is to be understood that this company, by the filing of this report, in no way waives its right to attack any tax levied or to be levied or assessed by the State against it, which may in-
[fol. 18] clude as a basis of the tax gross receipts derived from interstate business.

Very truly yours, (Signed) Leonard A. Sweney, Tax Attorney.

LAS. HSM.

Enc. -1.

SCHEDULE 3 TO RETURN

Memorandum Showing Calculations of Gross Receipts Taxable and Amount of Tax for Year 1928

This calculation is made in accordance with provisions of Chapter 195, Laws of 1900, as amended, using gross receipts and lengths of line as reported by the New Jersey Bell Telephone Company in their annual report to this Board.

| | | | |
|---|---|---|---|
| Gross Receipts of New York Telephone Company from Jan. 1, 1927, to Oct. 1, 1927: | | | |
| From Intra-state Business.... | $19,103,675.59 | | |
| From Inter-state Business.... | 5,898,870.78 | | |
| | | $25,002,546.37 | |
| Length of whole line, New York Telephone Company... | 10,829 miles | | |
| Length of line on public highway, New York Telephone Company ..... | 5,516 miles | | |
| Taxable Gross Receipts: | | | |
| $\frac{5,516}{10,829} \times \$25,002,546.37 =$ ..... | | | $12,735,621.53 |
| Gross Receipts of New Jersey Bell Telephone Company from Jan. 1, 1927, to Dec. 31, 1927: | | | |
| From Intra-state Business.... | $11,742,764.87 | | |
| From Inter-state Business.... | 3,535,020.81 | | |
| | | $15,277,785.68 | |
| Total Gross Receipts..... | | | $40,280,332.95 |
| Length of whole line, New Jersey Bell Telephone Company ..... | 15,203 miles | | |
| Length of line on public highway, New Jersey Bell Telephone Company..... | 8,403 miles | | |
| Taxable Gross Receipts: | | | |
| $\frac{8,403}{15,203} \times \$15,277,785.68 =$ ..... | | | 8,444,335.52 |
| Total Taxable Gross Receipts..... | | | $21,179,957.05 |

Tax, at 5%, = $1,058,997.85.

[fol. 19] STATEMENT RE SCHEDULE 4 TO RETURN

This schedule is a statement, by counties, of the various municipalities of the State of New Jersey in which appellant, New Jersey Bell Telephone Company, owns tangible personal property located on the public highways, together with the valuations of such property of said appellant as of October 1, 1927, as reported to the State Board of Taxes and Assessment by local assessors, through the county boards of taxation, for the purposes of apportionment of franchise tax for the year 1928. The total valuation of said property as shown by said statement is $41,189,804.00.

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[fol. 20] SCHEDULE 5 TO RETURN

Apportionment sheet showing apportionment of Franchise Tax of the New Jersey Bell Telephone Company for the year 1928 to various taxing districts in which this Company operates and therefore entitled to receive a share in proportion to the value of the property of the Company located on the highway of the district.

Taxable Gross Receipts: $21,179,957.05.

Tax at 5% = $1,058,997.85.

Example:

Tax (1,058,997.85) ÷ Valuation ($41,189,804) = Rate (.0257101939).

Valuation (22,173) × Rate (.0257101939) = Apportionment of tax for district ($570.07) (Absecon City—Atlantic County).

(Apportionment for balance of districts may be made by applying rate to valuations of local assessors as set out in Schedule 5.)

[fol. 21] SCHEDULE 6 TO RETURN

Franchise Tax, Corporations

Certificate of Apportionment

State Board of Taxes and Assessment

Trenton, N. J., May 15, 1928.

To the New Jersey Bell Telephone Company, Stephen C. Ormsbee, Treas., 1060 Broad St., Newark, N. J.:

I hereby certify that the State Board of Taxes and Assessment, in compliance with the provisions of Section 6

of an act of the Legislature of New Jersey (Chapter 195, P. L. 1900, as amended), has certified and reported to the Collector of Taxes of the several taxing districts through which the lines of your Company extend, the following apportionment of franchise tax due by your Company to such taxing districts respectively, said franchise tax being levied at the rate provided by law upon the gross receipts of your Company for business done in the State of New Jersey during the year ending December 31st last, and being apportioned in proportion to the value of your property located in, upon or under any public street, road, highway, lane or other public place in such taxing districts, and being payable in the same manner that other taxes are payable.

By order of the Board.

Chas. E. Cook, Secretary.

[fol. 22] Taxable Gross Receipts for the year ending December 31, 1927: $21,179,957.05.

Franchise Tax, @ 5%, $1,058,997.85.

Apportionment

The remainder of this schedule is an apportionment of the franchise tax above shown, listing the various municipalities of the State of New Jersey, by counties, to which the tax was apportioned, together with the amount of tax due each municipality.

---

[fol. 23] State of New Jersey, State Board of Taxes and Assessment

I, Chas. E. Cook, Secretary of the State Board of Taxes and Assessment, do hereby certify, that the foregoing are true copies of the reports, valuations of property as submitted by local assessors, certification to Company of tax due districts, and proceedings in the matter of the appeal of the New Jersey Bell Telephone Company, from the assessment of Franchise Tax levied under Chapter 195, Laws of 1900, as amended, for the year 1928, as the same are taken from and compared with the originals filed in the office of the State Board of Taxes and Assessment, on the first day of February and other dates A. D. 1928, and now remaining on file and of record therein.

In testimony whereof I have hereunto set my hand and affixed the official seal of the Board, at Trenton this twenty-sixth day of June, A. D. 1928.

Chas. E. Cook, Secretary. (Seal.)

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[fol. 24] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

REASONS FOR SETTING ASIDE ASSESSMENT OF TAXES—Filed July 2, 1928

The Prosecutor presents the following reasons for setting aside the assessment of taxes for the year 1928 against the Prosecutor made by the State Board of Taxes and Assessment and brought before this Honorable Court by the writ of certiorari in the above entitled cause:

1. Because the Act of the Legislature of the State of New Jersey, with the amendments thereof and supplements thereto, upon which the said assessment is based, and which is referred to in the said writ, is, in so far as it imposes or imports to impose a tax upon that part of the gross monetary receipts of the Prosecutor, which is derived from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries, and/or messages received in the State of New Jersey from other states of the United States and foreign countries, an invalid regulation of and/or burden upon interstate commerce in violation of Article I, Section 8, Para-[fol. 25] graph 3, of the Constitution of the United States;

2. Because the said assessment imposes a tax based upon the gross monetary receipts of the Prosecutor derived from the transmission of telephone messages from the State of New Jersey to other states of the United States and foreign countries and/or messages received in the State of New Jersey from other states of the United States and foreign countries, as well as upon receipts derived from telephone messages transmitted and received wholly within the State of New Jersey; and, in so far as the said assessment is based upon monetary receipts derived from telephone messages transmitted from the State of New Jersey to other

states of the United States and foreign countries, and/or messages received in the State of New Jersey from other states of the United States and foreign countries, it constitutes an invalid regulation of and/or burden upon interstate commerce in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States.

(Signed) Frankland Briggs, Attorney for Prosecutor. Thomas G. Haight, of Counsel with Prosecutor.

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[fol. 26] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

STIPULATION AS TO FACTS—Filed Aug. 4, 1928

It is hereby stipulated and agreed by and between the parties to this cause that the following shall be and constitute the state of facts upon which the above entitled action shall be submitted to the Court for adjudication:

1. The Prosecutor, New Jersey Bell Telephone Company, is a corporation organized and existing under the laws of the State of New Jersey, having its principal place of business in the City of Newark, Essex County, New Jersey.

2. Said New Jersey Bell Telephone Company is engaged, within said State, in the business of furnishing telephone service to and from points lying wholly in said State; and service to and from points lying in said State and points lying in other states of the United States and to and from points lying in said State and points lying in foreign countries.

3. In the conduct of its business aforesaid, said New Jersey Bell Telephone Company uses and occupies various [fol. 27] public streets, highways, roads and other public places in the State of New Jersey. Said company owns a vast amount of real and personal property which is located in the various taxing districts of New Jersey, in part on private property and in part upon the public streets, highways, roads, lanes or other public places of said State.

4. The real and tangible personal property of said New Jersey Bell Telephone Company has been assessed and taxed a property tax for the year 1928 by the local taxing officials of the various taxing districts of the State wherein the said property is located, and all taxes so assessed which are due and payable, except where appeals are pending, have been paid. Said New Jersey Bell Telephone Company is not subject to any franchise tax or tax upon its intangible property for the year 1928 other than that made pursuant to the act or acts under which the assessment here in question was made.

5. On or about the first day of February, 1928, the New Jersey Bell Telephone Company filed with the State Board of Taxes and Assessment a report as required by an Act of the Legislature of the State of New Jersey approved March 23, 1900 and entitled (as said title was amended) "An Act for the taxation of all the property and franchises of persons, copartnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand [fol. 28] eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled 'An Act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State,' approved May twenty-third, one thousand nine hundred and six," as the same was amended by acts approved March 13, 1917, March 4, 1918 and March 30, 1927. A true copy of said report is annexed hereto as "Schedule A." The gross receipts set forth in the said report did not include any receipts resulting from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries or messages received in the State of New Jersey from other states of the United States and foreign countries. The State Board of Taxes and Assessment was acquainted with this fact by a letter dated February 6th, 1928 and written to said Board by Leonard A. Sweney, the Tax Attorney of said Company.

6. Subsequently, by letter from the said Board dated February 29, 1928, the New Jersey Bell Telephone Company was directed to supplement the aforesaid report by reporting also the gross receipts of its business over, in, on and from its whole line for the year ending December 31, 1927, resulting from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries, and from telephone messages received in the State of New Jersey from other states of the United States and foreign countries.

[fol. 29] On or about March 3, 1928, the said New Jersey Bell Telephone Company, in compliance with said direction of the State Board of Taxes and Assessment of New Jersey, filed with the said Board a report, of which the annexed, marked "Schedule B," is a true copy.

Thereafter, on or about April 9, 1928, pursuant to the provisions of an act of the Legislature of New Jersey entitled "An Act to supplement an act entitled 'An Act for the taxation of all the property and franchises of persons, copartnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled, 'An Act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State,' approved May twenty-third, one thousand nine hundred and six, which first named act was approved March twenty-third, one thousand nine hundred, and amended by acts approved March thirteenth, nineteen hundred and seventeen, March fourth, nineteen hundred and eighteen, and March thirtieth, nineteen hundred and twenty-seven," approved March 27th, 1928, the said New Jersey Bell Telephone Company filed with the said State Board of Taxes and Assessment a report showing the gross receipts of the New York Telephone Company of business over, [fol. 30] in, on and from its whole line for the period of time from January 1, 1927 to October 1, 1927. Said report included gross receipts derived from the business of trans-

mitting and receiving telephone messages wholly within the State of New Jersey, the business of transmitting telephone messages from the State of New Jersey to other states of the United States and foreign countries, and the business of receiving messages in the State of New Jersey from other states of the United States and foreign countries. A true copy of said report is annexed hereto as "Schedule C."

7. On or about May 15th, 1928, the said State Board of Taxes and Assessment assessed against the said New Jersey Bell Telephone Company a tax upon such proportions of the total gross receipts of the New Jersey Bell Telephone Company for the year 1927 resulting from telephone messages transmitted and received within the State of New Jersey, as well as from messages transmitted from the State of New Jersey to other states of the United States and foreign countries and messages received in the State of New Jersey from other states of the United States and foreign countries, and the total gross receipts of the said New York Telephone Company received in the State of New Jersey from January 1st, 1927 to October 1st, 1927, resulting both from messages transmitted and received within the State of New Jersey and from messages transmitted from the State of New Jersey to other states of the United States and foreign countries and messages received in the State of New Jersey from other states of the United States and foreign countries, as the lengths of the lines [fol. 31] of the said New Jersey Bell Telephone Company and New York Telephone Company, respectively, in this state, along, in, on or over any street, highway, road, lane or other public place bear to the respective lengths of the whole lines of said companies, all as required by the act approved March 23, 1900, as amended, the title of which act, as amended, is set forth in Paragraph 5 hereof, and the act approved March 27, 1928, the title of which act is set forth in Paragraph 6 hereof.

8. Said tax, so assessed, amounts to the sum of $1,058,997.85. A true statement of the total gross receipts of the New York Telephone Company from January 1, 1927 to October 1, 1927, and the total gross receipts of the New Jersey Bell Telephone Company from January 1, 1927 to December 31, 1927, together with the taxable gross receipts of said companies, the tax computed thereon and the

method used in calculating the same all as fixed by said State Board of Taxes and Assessment is annexed hereto and marked "Schedule D."

9. Said Board of Taxes and Assessment apportioned the said tax to the various taxing districts of the State in proportion to the value of the property of the said New Jersey Bell Telephone Company located in, upon or under any public street, road, highway, lane or other public place therein as directed by the said act approved March 23rd, 1900, as amended. The proportion of the said tax which became due on June 1st, 1928, has been paid by the said New Jersey Bell Telephone Company to the various taxing districts in accordance with the apportionment made as [fol. 32] aforesaid by the said State Board of Taxes and Assessment.

Frankland Briggs, Attorney for Prosecutor. Edward L. Katzenbach, Attorney-General, Attorney for Defendant.

Dated July 31, 1928.

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STATEMENT RE "SCHEDULE A" TO STIPULATION

Schedule "A" is the report of the New Jersey Bell Telephone Company of its gross receipts ending December 31, 1927, the length of its whole line and length of its lines along any street, highway, road, lane or other public place in the State of New Jersey, together with the taxable gross receipts of said company, which report was sworn to by Stephen C. Ormsbee on February 1, 1928, and is the same as is shown in Schedule 1 of the Return of the State Board of Taxes and Assessment.

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[fol. 33] STATEMENT RE "SCHEDULE B" TO STIPULATION

Schedule "B" is the Supplemental Report of the New Jersey Bell Telephone Company of its gross receipts from interstate business for the year ending December 31, 1927, the length of its whole line and the length of its line along any street, highway, road, lane or other public place in the State of New Jersey, together with the taxable gross re-

ceipts of said company, which report was sworn to by Stephen C. Ormsbee on March 3, 1928, and is the same as shown in Schedule 1 of the Return of the State Board of Taxes and Assessment.

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[fol. 34] STATEMENT RE "SCHEDULE C" TO STIPULATION

Schedule "C" is the report of the New Jersey Bell Telephone Company of the gross receipts, both intrastate and interstate, of the New York Telephone Company from January 1, 1927 to October 1, 1927, made in accordance with the provisions of Chapter 109 of the Laws of 1928 of the State of New Jersey; the length of the whole line of said New York Telephone Company, and the length of the lines of said New York Telephone Company along any street, highway, road, lane or other public place in the State of New Jersey, together with the taxable gross receipts of said New York Telephone Company, which report was sworn to by Stephen C. Ormsbee on April 9, 1928, and is the same as shown in Schedule 1 of the Return of the State Board of Taxes and Assessment.

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[fol. 35] STATEMENT RE "SCHEDULE D" TO STIPULATION

Schedule "D" is the memorandum showing calculation of gross receipts taxable and amount of tax for year 1928 and is the same as the memorandum shown in Schedule 3 of the Return of the State Board of Taxes and Assessment.

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[fol. 36] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

Submitted October Term, 1928. Decided December 6th, 1928

OPINION—Filed December 6th, 1928

1

The method provided by the Statute; P. L. 1900, p. 502, as amended by P. L. 1927, p. 567, for ascertaining the value of the franchise tax of those using the public streets, highways or roads having part of the lines in New Jersey and

part in another State based upon gross receipts, the franchise tax for business done in New Jersey shall be upon such proportion of such gross receipts, as the length of the lines or mains in New Jersey bears to the length of the whole line or main. This method of calculating the value of the franchise does not offend against Art. One (1), Section Eight (8), paragraph three (3), of the Constitution of the United States; the interstate commerce clause. It is not a regulation of interstate commerce.

[fol. 37] 2

It is not a tax on gross receipts. The gross receipts being taken merely as a token or measure of the value of the franchise in New Jersey.

3

The case of Phillipsburg, &c. R. R. Co. v. State Board of Assessors, 82 N. J. L. 49; decided under P. L. 1906, p. 644, Sec. 4, 5, approved and followed.

Before Justices Minturn, Black, and Campbell

For the Prosecutor: Messrs. Wall, Haight, Carey & Hartpence; Mr. Frankland Briggs.

For the Defendant: John Solan, Esq., and Edward L. Katzenbach, Attorney-General of New Jersey.

The opinion of the Court was delivered by Black, J.:

The certiorari in this case was allowed to review the taxes assessed by the State Board of Taxes and Assessment against the prosecutor, the New Jersey Bell Telephone Company, for the year 1928, pursuant to the provisions of the Voorhees Franchise Tax Act, P. L. 1900, p. 502, as the same has been amended by the Acts, P. L. 1917, p. 42; P. L. 1918, p. 907; P. L. 1927, p. 567, and P. L. 1928, p. 233. The latter Act has no application to this controversy, that Act simply imposes upon the prosecutor, as the successor to part of the business of the New York Company the tax, to which the latter would have been subject under the Act, P. L. 1900, p. 502, had it continued to do business in New Jersey during the year 1928.

The sole reason assigned for setting aside the tax was the method, by which the amount of the tax was computed.

The allegation is, that in so far as, it is based in part [fol. 38] upon gross receipts derived from interstate commerce, it is a regulation of and burden upon interstate commerce, in violation of Article One (1), Section Eight (8), Paragraph Three (3), of the Constitution of the United States.

The method, *by* which the State Board of Taxes and Assessment adopted in calculating the tax under review is as follows:

**Memorandum Showing Calculations of Gross Receipts Taxable and Amount of Tax for Year 1928**

**This calculation is made in accordance with provisions of Chapter 195, Laws of 1900, as amended, using gross receipts and lengths of line as reported by the New Jersey Bell Telephone Company in their annual report to this Board.**

| | | | |
|---|---|---|---|
| Gross Receipts of New York Telephone Company from Jan. 1, 1927, to Oct. 1, 1927: | | | |
| From Intra-state Business.... | $19,103,675.59 | | |
| From Inter-state Business.... | 5,898,870.78 | | |
| | | $25,002,546.37 | |
| Length of whole line, New York Telephone Company... | 10,829 miles | | |
| Length of line on public highway, New York Telephone Company ..... | 5,516 miles | | |
| Taxable Gross Receipts: | | | |
| $\frac{5,516}{10,829} \times \$25,002,546.37 =$ ..... | | | $12,735,621.53 |
| Gross Receipts of New Jersey Bell Telephone Company from Jan. 1, 1927, to Dec. 31, 1927: | | | |
| From Intra-state Business.... | $11,742,764.87 | | |
| From Inter-state Business.... | 3,535,020.81 | | |
| | | $15,277,785.68 | |
| Total Gross Receipts..... | | | $40,280,332.95 |
| Length of whole line, New Jersey Bell Telephone Company ..... | 15,203 miles | | |
| Length of line on public highway, New Jersey Bell Telephone Company..... | 8,403 miles | | |
| Taxable Gross Receipts: | | | |
| $\frac{8,403}{15,203} \times \$15,277,785.68 =$ ..... | | | 8,444,335.52 |
| Total Taxable Gross Receipts..... | | | $21,179,957.05 |

Tax, at 5%, = $1,058,997.85.

[fol. 39] The pertinent parts of the statute under which the tax was calculated and assessed are as follows:

Sec. 1. "All the property, real and personal, and fran-"chises of all persons, co-partnerships, associations or cor-"porations, other than municipal or corporations taxed "under the Act," &c. that "have or may hereafter have "the right to use or occupy and occupying the streets, "highways, roads, lanes or public places in this State, "shall hereafter be valued, assessed and taxed as herein-"after provided." P. L. 1900, p. 502, as amended by P. L. 1917, p. 42.

Sec. 8. "The franchise taxes imposed by this Act shall "be in lieu of all other franchise taxes now assessed against "the persons, co-partnerships, associations or corporations, "subject to the provisions of this Act and their property." P. L. 1900, p. 502, as amended by P. L. 1902, 477.

Sec. 4. "All such persons, &c., having part of his, her "or its lines or mains in this State and part thereof in "another State or States, or having part of his, her or its "lines or mains on private property and part thereof on "public streets, highways, roads, lanes or other public "places, shall make a report showing the gross receipts "of his, her or its business over, in, on and from the whole "line or mains, together with a statement of the length of "the whole line or mains and the length of the line or "mains in this State along any street, highway, road, lane "or other public place; and the franchise tax of such per-"son, &c., for business so done in this State, shall be upon "such proportion of such gross receipts as the length of [fol. 40] "the lines or mains in this State, along, in, on or "over any street, highway, road, lane or other public place "bears to the length of the whole line or mains"; P. L. 1927, p. 567, Sec. 4.

This precise question was before this Court in the case of Phillipsburg, &c., R. R. Co. v. State Board of Assessors, 82 N. J. L. 49. That case, however, was decided under the Act of P. L. 1906, p. 844; but that Statute was a copy of the Act P. L. 1900, p. 502, Sec. 4, involved in this controversy. The same point was considered in the case of

Phillipsburg Transit Co. v. State Board of Taxes and Assessment, 99 N. J. L. 319, affirmed 101 N. J. L. 225; under P. L. 1906, p. 644, Sec. 4, as amended by P. L. 1918, p. 903.

The facts of the case under review and the law pertinent thereto are similar to the facts and the law involved in those cases. The Act, P. L. 1906, p. 644, Sec. 4, under which the Phillipsburg case was decided and the Act under discussion, P. L. 1900, p. 502, so far as this controversy is concerned, the pertinent parts of the Acts are identical, as stated above, the Act, P. L. 1906, p. 644, was copied from the Act of P. L. 1900, p. 502.

So, we feel bound to follow the case of Phillipsburg, &c., R. R. Co. v. State Board of Assessors, 82 N. J. L. 49. We think, however, that case was rightfully decided and quite independent of that case, we think the method adopted by the State Board of Taxes and Assessment in the instant case was not illegal and not in violation of the commerce clause of the United States Constitution, but in harmony with the decisions of the United States Supreme Court, the ultimate authority on the point here involved.

[fol. 41] It would be a hopeless task to even attempt to harmonize the decisions of that Court on this point, much more, it would be a useless task, as that Court is the sole and ultimate authority on the subject. The application of these decisions to specific cases, as they arise, must be made by that Court, and as has been said, by this Court in reference to those decisions, they would gain nothing by our concurrence and suffer nothing by our dissent. Erie R. R. Co. v. Public Utility Commissioners, 89 N. J. L. 90. It may not be amiss, however, to point out the cases which the State relies upon for sustaining the method adopted for calculating the amount of the tax in the present case.

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; Cudahy Packing Co. v. State of Minnesota, 246 U. S. 450. In that case it was said, the nature and effect of taxes more or less like this has been repeatedly considered in this Court. In some instances its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled, it has not been easy to apply them to all the varying situations presented. Pullman Co. v. Richardson, 261 U. S. 330; State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217.

On the other hand, the prosecutor relies upon the cases of State of Maine v. Grand Trunk Ry. Co., 142 U. S. 217; Philadelphia, &c., Steamship Co. v. Pennsylvania, 122 U. S. 326; Galveston, &c., Ry. Co. v. Texas, 210 U. S. 217; Meyer, &c., Oklahoma v. Wells Fargo, &c., Co., 223 U. S. 298.

[fol. 42] The prosecutor insists, that these cases hold, that license or franchise taxes based on gross receipts partly derived from interstate commerce are illegal. Such taxes are an unlawful regulation of or burden upon interstate commerce, in so far as they are based on gross receipts derived from interstate commerce.

The State distinguishes the cases above cited from the present case and urges, in the case at bar, the tax in question is the only one imposed by statute upon the property right, i. e., the franchise right of the prosecutor, to use the public streets, and that, in valuing that property right account may be taken under the doctrine in the case of the United States Express Co. v. State of Minnesota, 223 U. S. 335, of the total receipts of which the employment of such special franchise gives rise, including receipts from interstate commerce, or as expressed by Mr. Justice Van Deventer, in the case of Cudahy Packing Co. v. State of Minnesota, 246 U. S. 450; it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as an index or measure of the value of the property for taxing purposes. We think that is the situation in this case. The method adopted for calculating the tax, viz., the gross earnings being taken merely as a measure of the value of the franchise of the prosecutor.

The tax brought under review is affirmed and the writ of certiorari is dismissed.

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[fol. 43] In Supreme Court of New Jersey

New Jersey Bell Telephone Company, Prosecutor,

vs.

State Board of Taxes and Assessment, Defendant

On Certiorari

Rule for Judgment—December 11, 1928

The Court having inspected the assessment of taxes removed by the writ in this cause, the reasons filed herein and

heard the argument of counsel thereon and having duly considered the same, it is ordered that said assessment of taxes be affirmed and the writ of certiorari dismissed.

Entered December 11, 1928.

On motion of

Edward L. Katzenbach, Attorney General of New Jersey, Attorney for Defendant.

A true copy. Fred L. Bloodgood, Clerk.

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[fol. 44] In Supreme Court of New Jersey

[Title omitted]

Notice of Appeal—Filed January 15, 1929

To State Board of Taxes and Assessment and Hon. Edward L. Katzenbach, Attorney General of New Jersey:

Take notice, that the Prosecutor in the above-entitled cause appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Supreme Court sustained an assessment of taxes for the year 1928 against the Prosecutor made by the State Board of Taxes and Assessment, and dismissed the writ of certiorari which brought the said assessment before the said Court for review.

2. Because the Supreme Court rendered judgment for the defendant rather than the Prosecutor.

3. Because in rendering the said judgment the Supreme Court decided that the Act of the Legislature of the State of New Jersey, with the amendments thereof and supple-
[fol. 45] ments thereto, upon which the said assessment is based, and which is referred to in the said writ, is not in so far as it imposes or imports to impose a tax upon that part of the gross monetary receipts of the Prosecutor, which is derived from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries, and/or messages received in the

State of New Jersey from other states of the United States and foreign countries, an invalid regulation of and/or burden upon interstate commerce in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States.

4. Because in rendering the said judgment the Supreme Court denied that the said assesment, which imposes a tax based upon the gross monetary receipts of the Prosecutor derived from the transmission of telephone messages from the State of New Jersey to other states of the United States and foreign countries and/or messages received in the State of New Jersey from other states of the United States and foreign countries, as well as upon receipts derived from telephone messages transmitted and received wholly within the State of New Jersey, does not constitute an invalid regulation of and/or burden upon interstate commerce in violation of Article 1, Section 8, Paragraph 3, of the Constitution of the United States, in so far as the said assessment is based upon monetary receipts derived from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries, and/or messages received in the State of New Jersey from other states of the United States and foreign countries.

[fol. 46] 5. Because the Supreme Court held that the said assessment was a property tax rather than a license tax.

6. Because the Supreme Court held that in making the said assessment under the said Statute, gross earnings of the Prosecutor were taken merely as a measure of the value of the franchise of the Prosecutor to use the public streets, highways, roads, lanes and other public places in the State of New Jersey.

Frankland Briggs and Wall, Haight, Carey & Hartpence, Attorneys for Prosecutor.

Service of copy of Notice of Appeal is acknowledged this seventh day of January, 1929.

Edward L. Katzenbach.

[fol. 46½] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

Doc. No., 8264

[Title omitted]

No. 106 of Feb. Term, 1929.
Date: May 20, 1929.
The Chancellor presiding.
Opinion per Curiam.

| Check list | Affirm | Reverse | Modify |
|---|---|---|---|
| The Chancellor | 1 | .. | .. |
| " Chief Justice | 1 | .. | .. |
| Mr. Justice Trenchard | .. | .. | .. |
| " Parker | 1 | .. | .. |
| " Kalisch | 1 | .. | .. |
| " Black | .. | .. | .. |
| " Campbell | .. | .. | .. |
| " Lloyd | 1 | .. | .. |
| " Case | 1 | .. | .. |
| Judge Van Buskirk | .. | .. | .. |
| " McGlennon | 1 | .. | .. |
| " Kays | 1 | .. | .. |
| " Hetfield | 1 | .. | .. |
| " Dear | 1 | .. | .. |

[File endorsement omitted.]

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[fol. 47] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY, FEBRUARY TERM, 1929

No. 106

NEW JERSEY BELL TELEPHONE COMPANY, Appellant,

vs.

STATE BOARD OF TAXES AND ASSESSMENT, Respondent

Appeal from Supreme Court

OPINION—Filed May 20, 1929

Per CURIAM:

The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Black in the Supreme Court.

[File endorsement omitted.]

[fol. 48] In Court of Errors and Appeals of New Jersey

Between

New Jersey Bell Telephone Company, Appellant.

vs.

The State Board of Taxes and Assessment, Respondent

Judgment—Filed May 22, 1929

This cause having been duly argued at the February Term, 1929 of this court by Frankland Briggs, Attorney for Appellant, and Thomas G. Haight and Leonard A. Sweney, of Counsel for the Appellant and William A. Stevens, Attorney General, of Counsel for the Respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court:

It is thereupon, on this twenty-second day of May in the year of our Lord one thousand nine hundred and twenty-nine, ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court

On motion of

William A. Stevens, Attorney General, Attorney for Respondent.

[File endorsement omitted.]

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[fol. 49] In Court of Errors and Appeals of New Jersey

[Title omitted]

**Petition for Appeal, Assignment of Errors, and Prayer for Reversal**—Filed June 25, 1929

Petition for Appeal

Considering itself aggrieved by the final judgment of the Court of Errors and Appeals of the State of New Jersey

in the above entitled cause, the appellant therein, New Jersey Bell Telephone Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

And the said New Jersey Bell Telephone Company assigns the following errors in the judgment of the said Court of Errors and Appeals:

1. The said Court erred in that in rendering the said judgment it decided, contrary to Appellant's contention, and the Act of the Legislature of the State of New Jersey, with the amendments thereof and supplements thereto, pursuant to which the tax herein complained of was imposed, [fol. 50] as construed and applied herein, is not an invalid regulation of or burden upon interstate commerce, in violation of Article I, Section 8, Paragraph 3 of the Constitution of the United States, in so far as it imposes a tax upon that part of the gross receipts of the appellant derived from telephone messages transmitted from the State of New Jersey to other states of the United States and foreign countries, or messages received in the State of New Jersey from other states of the United States and foreign countries: said act being entitled (as said title was amended), "An Act for the taxation of all the property and franchises of persons, copartnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled 'An Act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled 'An act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State,' approved May twenty-third, one thousand nine hundred and six," approved March 23, 1900, and amended by acts approved March 13, 1917, March 4, 1918 and March 30, 1927 and supplemented by the Act approved March 27, 1928.

2. The said Court erred in that in rendering the said judgment it decided, contrary to Appellant's contention, that the said tax imposed pursuant to said Act, and the amendments thereof and supplements thereto, as construed and applied herein, in so far as said tax was imposed upon the gross receipts of the appellant derived from the transmission of interstate and foreign telephone messages, as [fol. 51] aforesaid, does not constitute an invalid regulation of or burden upon interstate and foreign commerce, in violation of Article I, Section 8, Paragraph 3 of the Constitution of the United States.

3. The said Court erred in that in rendering the said judgment it decided, contrary to Appellant's contention, that the said Act of the Legislature of the State of New Jersey, and the amendments thereof and supplements thereto, as construed and applied herein, in so far as they authorized the imposition of a tax based upon or measured by the gross monetary receipts of the appellant derived from the transmission of interstate and foreign telephone messages, as aforesaid, does not deprive appellant of its property without due process of law, and does not deny to appellant the equal protection of the laws in violation of Section 1, Paragraph 2 of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

For which errors the appellant, New Jersey Bell Telephone Company, prays that the said judgment of the Court of Errors and Appeals of the State of New Jersey dated the twenty-second day of May, 1929, in the above entitled cause be reversed and a judgment rendered in favor of said appellant and for costs.

(Signed) Frankland Briggs, Attorney for Appellant.
Thomas G. Haight, of Counsel.

[File endorsement omitted.]

[fol. 52] In Court of Errors and Appeals of New Jersey

[Title omitted]

Order Allowing Appeal—Filed June 25, 1929

The appellant in the above entitled matter, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Court of Errors and Appeals of the State of New Jersey on the twenty-second day of May, 1929, and from each and every part thereof, and having presented and filed its Petition for Appeal, Assignment of Erorrs, and Prayer for Reversal, pursuant to the statutes and rules of the Supreme Court in such case made and provided;

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Court of Errors and Appeals of the State of New Jersey in the above entitled cause as provided by law, and it is further ordered that the Clerk of the said Court of Errors and Appeals of the State of New Jersey or the Clerk of the Supreme Court of the State of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days [fol. 53] of this date.

And it is further ordered that upon the filing by the appellant with the Clerk of this Court of a bond in the sum of $250,000.00, with good and sufficient security to be approved as to form and sufficiency of security by the undersigned, conditioned that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, all proceedings to collect the tax or any part thereof, the validity of which was affirmed by the said judgment of the Court of Errors and Appeals of the State of New Jersey, be and they are hereby stayed pending this appeal.

Dated June 25th, 1929.

(Signed) E. R. Walker, Chancellor of the State of New Jersey and Presiding Judge of the Court of Errors and Appeals of New Jersey.

[File endorsement omitted.]

[fols. 54-55½] Citation, in usual form, showing service on M. A. Stevens, filed June 29, 1929, omitted in printing.

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[fols. 56-63½] Bond on appeal for $250,000, approved and filed July 5, 1929, omitted in printing.

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[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

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[fols. 65 & 66] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 20, 1929

Comes now the appellant and adopts its Assignment of Errors, record pages 49, 50 and 51, as its Statement of the Points to be Relied Upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case and is to be printed, excepting, however, the Stipulation between the parties to this cause, dated July 15th, 1929, record pages 59 to 63, inclusive, which need not be printed.

Franklin Briggs, Counsel for Appellant.

[fol. 67] [File endorsement omitted.]

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Endorsed on cover: File No. 34,385. New Jersey Court of Errors and Appeals. Term No. 254. New Jersey Bell Telephone Company, appellant, vs. The State Board of Taxes and Assessment of the State of New Jersey. Filed July 20, 1929. File No. 34,385.

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OCT 2
CHARLES ELMOR

(34,385)

# Supreme Court of the United States

**OCTOBER TERM, 1929.**

**No. 254.**

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
*Respondent.*

**Notice of Motion, and Motion to Advance.**

WILLIAM A. STEVENS,
Attorney General.

DUANE E. MINARD,
Assistant Attorney General,
*Attorneys for Respondent.*

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

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(34,385)

IN THE SUPREME COURT OF THE
UNITED STATES.

October Term, 1929.

No. 254.

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

THE STATE BOARD OF TAXES AND ASSESSMENT
OF THE STATE OF NEW JERSEY,
*Respondent.*

**NOTICE OF MOTION TO ADVANCE.**

TO:
Frankland Briggs, Esquire,
Attorney for Appellant.

PLEASE TAKE NOTICE that on Monday, October 7, 1929, upon the opening of the Court, we will submit to the Court the annexed motion to advance the argument of this cause.

WILLIAM A. STEVENS,
Attorney General.

DUANE E. MINARD,
Assistant Attorney General,
*Attorneys for Respondent.*

September 25, 1929.

Timely notice acknowledged this 27th day of September, 1929.

FRANKLAND BRIGGS,
*Attorney for Appellant.*

(34,385)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 254.

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
*Respondent.*

## MOTION OF RESPONDENT TO ADVANCE.

Comes now the State Board of Taxes and Assessment of the State of New Jersey, respondent herein, and moves that this case be advanced for early hearing and in support of its motion makes the following brief statement of the matter involved and the reasons relied upon for advancement:

This case involves the validity of a tax imposed by the State of New Jersey upon the plaintiff amounting, for the year 1928, to $1,058,997.85. Approximately half of this amount was paid on or before June 1, 1928. The balance remains unpaid pending the determination of this appeal.

The tax in question is assessed by the respondent and the amount thereof is apportioned and distributed among 531 municipalities through which the plaintiff maintains and operates its telephone lines, in proportion to the length of the telephone line in the streets or public places of each municipality. The amounts due to the several municipalities, ranging up to $185,000, is set up in the annual budget as anticipated revenue for the current year. If payment is

delayed the budget has to be balanced by borrowing and by carrying the deficiency in subsequent budgets until paid, or met by an additional assessment on other ratables. As a result of this litigation 531 municipalities suffered deficiencies in revenue in 1928 which they must carry until this appeal is determined. Moreover, this is an annually recurring tax and the assessment of a similar amount for 1929, of which half was due June 1, and the balance will be due December 1, 1929, is now under review, the outcome of which will be governed by the determination of this appeal.

Wherefore the respondent prays that the case may be advanced upon the calendar and assigned for hearing at an early date.

Respectfully submitted,

WILLIAM A. STEVENS,
Attorney General.

DUANE E. MINARD,
Assistant Attorney General,
*Attorneys for Respondent.*

October 7, 1929.

I concur in the foregoing motion.

FRANKLAND BRIGGS,
*Attorney for Plaintiff.*

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CHARLES

# Supreme Court of the United States

**October Term, 1929**

**No. 254**

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

vs.

STATE BOARD OF TAXES AND ASSESSMENT,
*Appellee.*

## STATEMENT AS TO JURISDICTION ON APPEAL

FRANKLAND BRIGGS,
540 Broad Street,
Newark, N. J.

THOMAS G. HAIGHT,
15 Exchange Place,
Jersey City, N. J.
*Counsel for Appellant.*

# Supreme Court of the United States

**October Term, 1929.**

**No. 254.**

---

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

STATE BOARD OF TAXES AND ASSESSMENT,
*Appellee.*

---

## STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

### I.

### The Statutory Provisions Sustaining Jurisdiction.

(a) That part of Section 237 of the Judicial Code, as the same was amended by the Act approved February 13, 1925, and known as Chapter 229, Section 1, of 43 Stat. at Large, 937 (United States Code Annotated, Title 28, Section 344), which provides that:

> "A final judgment or decree in any suit in the highest Court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution,

> treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(b) The Act approved January 31, 1928 and known as Chapter 14 of 45 Stat. at Large, as amended by an Act approved April 26, 1928 and known as Chapter 440 of 45 Stat. at Large, 446, which provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "Sec. 2 (as amended). The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

## II.

**Date of judgment and date of application for appeal.**

The judgment sought to be reviewed by this appeal was entered on the 22nd day of May, 1929 (R. p. 48) by the New Jersey Court of Errors and Appeals, the highest Court of New Jersey in which a decision in this suit could be had.

The application for appeal was presented to the Chancellor of New Jersey, Presiding Judge of the said New Jersey Court of Errors and Appeals on the 25th day of June, 1929 (R. p. 51), and the Order Allowing Appeal was signed by the said Chancellor on the 25th day of June, 1929 (R. pp. 52-53).

## III.

## Nature of Case and Rulings Below.

This case involves the validity, under the Constitution of the United States, of an Act of the Legislature of the State of New Jersey approved March 23, 1900 and known as Chapter 195 of the Laws of that year (P. L. 1900, p. 502), as the same was amended by Acts approved March 13, 1917 (P. L. 1917, p. 42), March 4, 1918 (P. L. 1918, p. 907), March 30, 1927, (P. L. 1927, p. 567) and supplemented by the Act approved March 27, 1928 (P. L. 1928, p. 223), in so far as said Act provides for or authorizes the imposition and assessment of a tax based upon the gross monetary receipts of appellant derived from interstate as well as intrastate commerce.

Pursuant to the provisions of the above Act (as amended and supplemented), the State Board of Taxes and Assessment (of New Jersey) assessed a tax against appellant based on the total gross receipts derived from telephone messages transmitted and received in interstate as well as intrastate commerce (R. pp. 18 and 21-22). Appellant paid so much of said tax as was based on gross receipts derived from intrastate commerce, but conceiving that the part which was based upon receipts derived from interstate commerce was invalid under the Constitution of the United States, appellant, on or about June 9, 1928, caused a Writ of Certiorari (R. p. 1) to be issued out of the New Jersey Supreme Court to test the validity thereof. It was appellant's contention that the said State Board of Taxes and Assessment should not have construed the said Act of the Legislature of New Jersey (as amended and supplemented) to authorize the imposition of taxes upon gross receipts derived from interstate commerce, and that if the Act were so construed and applied,

it was repugnant to the Constitution of the United States (R. pp. 24-25).

The New Jersey Supreme Court, however, on or about December 6, 1928, affirmed the said tax and dismissed the Writ of Certiorari (R. pp. 36-42). The said Court held that neither the tax here in question nor the said Act (as amended and supplemented), pursuant to which the said tax was imposed, was repugnant to the Constitution of the United States. From the judgment of the New Jersey Supreme Court (R. p. 43), appellant herein appealed to the New Jersey Court of Errors and Appeals (R. pp. 44-46), which Court, on or about May 22, 1929 (R. p. 48), affirmed the said judgment of the New Jersey Supreme Court.

From the said judgment of the New Jersey Court of Errors and Appeals, appellant now appeals to the United States Supreme Court (R. pp. 49-51), and prays that the said judgment of the New Jersey Court of Errors and Appeals (the highest Court of the State in which a decision in this suit could be had) be reversed, upon the grounds (1) that the said Act of the Legislature of the State of New Jersey (as amended and supplemented), pursuant to which said tax was assessed and levied, and the said tax are invalid as in violation of Article I, Section 8, Paragraph 3 of the Constitution of the United States; and (2) that the said Act of the Legislature of the State of New Jersey (as amended and supplemented), pursuant to which said tax was assessed and levied, deprives appellant of its property without due process of law and denies to appellant the equal protection of the laws, in violation of Section 1, Paragraph 2 of the Fourteenth Amendment to the Constitution of the United States. (Assignment of Errors, R. pp. 49-51).

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NOTE: All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the New Jersey Court of Errors and Appeals and on file with the Clerk of this Court. The record has not yet been printed.

## IV.

### Cases Believed to Sustain Jurisdiction.

The following decisions (among others) of this Court are believed to sustain its jurisdiction on this appeal:

1. Cases specifically holding that in cases such as this, Appeal (or Writ of Error) is the proper procedure:

*Giozza* v. *Tiernan*, 148 U. S. 657;
*Ex parte Williams*, 277 U. S. 267;
*Great Northern Railway Co.* v. *Minnesota*, 278 U. S. 503.

2. Cases involving the same questions as are presented in this case, in which jurisdiction was assumed without comment:

*Philadelphia & Southern Steamship Company* v. *Pennsylvania*, 122 U. S. 326;
*Fargo* v. *Hart*, 193 U. S. 490;
*Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217;
*Meyer, etc. of Oklahoma* v. *Wells Fargo & Co.*, 223 U. S. 298;
*U. S. Express Company* v. *Minnesota*, 223 U. S. 335;
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*Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389;

*Missouri-Kansas-Texas R.R. Co.* v. *Mars,* 278 U. S. 258;
*Metropolis Ferry Co.* v. *Kentucky,* 279 U. S. 245.
*Macallen Company* v. *Massachusetts,* U. S. ; 49 Sup. Ct. Rep. 432;

It is respectfully submitted that this Court has jurisdiction of this appeal, by virtue of Section 237 of the Judicial Code, as amended by the Act approved February 13, 1925, and the Act approved January 31, 1928, as amended by the Act approved April 26, 1928.

FRANKLAND BRIGGS,
THOMAS G. HAIGHT,
*Counsel for Appellant.*

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# Supreme Court of the United States

**October Term, 1929.**

**No. 254.**

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

vs.

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
*Appellee.*

On Appeal From the Court of Errors and Appeals of New Jersey.

## BRIEF FOR APPELLANT

CHARLES M. BRACELEN,
FRANKLAND BRIGGS,
THOMAS G. HAIGHT,
ALFRED E. HOLCOMB,
LEONARD A. SWENEY,
*Counsel for Appellant.*

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Point II. 18

The tax in question being of the kind and having the characteristics set forth in the next preceding point is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.

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# Supreme Court of the United States

**October Term, 1929.**

**No. 254.**

| | |
|---|---|
| NEW JERSEY BELL TELEPHONE COMPANY, *Appellant,* vs. THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY, *Appellee.* | On Appeal From the Court of Errors and Appeals of New Jersey. |

## BRIEF FOR APPELLANT.

### Opinions of Courts Below and Grounds of Jurisdiction.

This case is here on appeal from the Court of Errors and Appeals of New Jersey, the highest court of that State. The opinion of the Supreme Court of New Jersey, the Court in which this case was first litigated, is reported in 143 Atl. Rep. 841 (not yet officially reported) and is quoted in full on pages 22-27 of the record.

The opinion of the Court of Errors and Appeals simply affirmed the judgment of the Supreme Court on the opinion of that Court. It is reported in 146 Atl. Rep. 915 (not yet officially reported), and is quoted at page 30 of the record.

In accordance with paragraph 1 of Rule 12 of this Court, appellant, in due course, filed with this Court a "Statement As To Jurisdiction On Appeal", and the Court has found that probable jurisdiction has been shown.

## Statement of the Case.

The appellant, a New Jersey corporation, is engaged in the business of furnishing telephone service to and from points lying wholly in New Jersey and to and from points in that state and points in other states of the United States and in foreign countries.[1] In the conduct of its business, appellant uses and occupies—by poles and conduits—various public streets, highways, roads and other places in New Jersey. It owns a vast amount of real and personal property located in various taxing districts of New Jersey, in part on private property and in part on or in the public streets and highways.[2]

Pursuant to the provisions of an act of the Legislature of New Jersey approved March 23, 1900, as the same has been amended[3] (a copy of which is set forth in Appendix A and is hereinafter referred to as the Act of 1900), appellant filed with the State Board of Taxes and Assessment of New Jersey, hereinafter referred to as appellee, a report setting forth so much of its gross receipts for the year ended December 31, 1927, as it considered properly taxable under that act.[4] This return did not include any of appellant's receipts derived from the transmission of telephone messages to and from points in New Jersey and points outside of that State, as it was considered by appellant that these were not taxable because they arose from interstate commerce.[5] Subsequently, appellee directed appellant to supplement its

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[1] R., p. 17.
[2] R., p. 17.
[3] 4 N. J. Compld. Stat. p. 5298; P. L. 1917, p. 421; P. L. 1918, p. 907; P. L. 1927, p. 567.
[4] R., p. 18; pp. 3-4.
[5] R., p. 18; pp. 8-9.

report by including the gross receipts derived from interstate commerce.[6] Appellant promptly complied with that requirement.[7] The latter report, however, was made under protest upon the ground that no tax could be lawfully levied upon the gross receipts derived from appellant's interstate business.[8]

On October 1, 1927, appellant succeeded to the property and business of the New York Telephone Company in New Jersey. The latter company did not file a report of its gross receipts for the year 1927 because it had ceased to operate in New Jersey on September 30, 1927 and therefore was not subject to the tax provided for in the Act of 1900.[9] Thereafter the New Jersey Legislature passed an act, which was approved March 27, 1928 (P. L., 1928, p. 223, and hereinafter referred to as the Act of 1928), requiring appellant to report the gross receipts of the New York Telephone Company during the part of the year 1927 when the latter was carrying on the business in New Jersey to which appellant succeeded, and to pay a tax for the year 1928 based thereon. As this latter statute is not involved in any of the questions presented in this case, it is not quoted. Accordingly, on April 9, 1928, appellant filed the report required by the last-mentioned statute, which included the gross receipts derived by the New York Company from transmitting and receiving telephone messages to and from the State of New Jersey and other states and foreign countries, as well as those messages transmitted and received wholly within the State of New Jersey.[10] Appellant again protested, however, that the gross receipts

[6] R., p. 19; p. 10.
[7] R., p. 19; pp. 5-6.
[8] R., p. 6.
[9] R., pp. 4-5.
[10] R., pp. 19-20; pp. 7-8.

derived from interstate business were not subject to taxation under either statute.[11]

On May 15, 1928, appellee assessed a tax against appellant based on its total gross receipts and those of the New York Company for the year 1927, which receipts included those derived from interstate as well as intrastate business.[12] The tax so assessed amounts to $1,058,997.85.[13]

It was appellant's contention before the Courts below that so much of the tax as is based upon its gross receipts and those of the New York Company derived from interstate business is invalid because it constitutes an unlawful regulation of, or burden upon, interstate commerce in violation of Article I, Section 8, Paragraph 3 of the Federal Constitution[14], and it so contends here. This contention, of course, also necessarily includes the contention that in so far as the Act of 1900 authorizes the imposition of the tax, it likewise is invalid for the same reason.

The New Jersey Supreme Court before which the case first came for decision sustained the tax.[15] From the opinion of the Court delivered by Mr. Justice BLACK[16] it would appear that while the Court expressly followed one of its prior decisions (which decision was rested upon what it assumed this Court had decided in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217), it nevertheless concluded that quite independently of that case the tax was valid.

An appeal was taken to the New Jersey Court of Errors and Appeals and the judgment of the Supreme Court was affirmed "for the reasons expressed in the opinion deliv-

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[11] R., p. 8.
[12] R., p. 20; p. 21.
[13] R., p. 20; p. 13.
[14] R., pp. 16-17.
[15] R., pp. 27-28.
[16] R., pp. 22-27.

ered by Mr. Justice BLACK in the Supreme Court".[17] Thereupon, the case was brought to this Court on appeal, pursuant to Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Section 344) and the Act of January 31, 1928 as amended by the Act of April 26, 1928 (45 Stat. at L., Chap. 14; 45 Stat. at L., 446).

## Specification of Assigned Errors Relied Upon.

Appellant relies upon assigned errors numbered 1 and 2 as the same are set forth on pages 32 and 33 of the record.

No question is raised as to the right of the state to impose a tax on appellant based on the receipts of the New York Company derived from business done in 1927 *wholly* in New Jersey.

## Summary of Argument.

*1. The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is in addition to the ordinary ad valorem taxes on appellant's real and personal property.*

*2. Such a tax is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.*

*3. Even if the tax in question can be deemed a property tax it is invalid, in that it violates the commerce clause of the Federal Constitution.*

---

[17] R., pp. 30-31.

## Argument.

It has been definitely settled by this Court that the transmission and receipt of messages by wire between different states constitute interstate commerce. *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Western Union Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *LeLoup* v. *Mobile*, 127 U. S. 640; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406.

### I.

**The tax in question is not a substituted or commuted property tax imposed in lieu of other property taxes, but is a license tax, at a fixed rate of 5%, levied directly on appellant's gross receipts derived from interstate as well as intrastate business, and is *in addition to* the ordinary *ad valorem* taxes on appellant's real and personal property.**

The Act of 1900 (Appendix A), which is the act in question in this case, provides that all the property, real and personal, and franchises of persons or corporations except railroad, canal, street railroad and municipal corporations having the right to use or occupy and occupying the streets, highways, roads or public places in this state, shall be taxed as follows:

(a) The local or municipal authorities of the several taxing districts are to value, assess and tax, at local rates *all* of the property, both that located upon streets, highways, and public places, and that not so located, within

their respective taxing districts, in accordance with the general tax act of New Jersey (P. L. 1918, p. 847, as amended).

*This is the ordinary ad valorem tax assessed against the real and personal property of appellant, to which all property in New Jersey is subject.*

(b) The taxpayer is required to file with the State Board of Taxes and Assessment a report showing the gross receipts of its business over its whole lines during the preceding calendar year, together with a statement of the length of its whole lines, and the length thereof along streets, highways and public places in the State of New Jersey, and the board is then to assess a tax of 5% upon such proportion of the total gross receipts as the length of the lines of the taxpayer in streets, highways and public places in New Jersey bears to the length of its whole lines (Sec. 4-5); and to distribute the tax among the various taxing districts in which the property of the taxpayer is located in proportion to the value of the property located in their respective public streets, highways or public places (Sec. 6).

*It is the latter tax which is in question here.*

It is apparent that this tax is not a substituted or commuted property tax in lieu of all other taxes against the properties of the appellant, because, as above shown, the statute expressly provides for the assessment and collection of the ordinary *ad valorem* taxes on appellant's real and personal property. Nor is it in any sense a substituted or commuted property tax on appellant's franchise as *property*, but is simply a license or privilege tax. That this is so is manifest, we submit, from the following considerations:

1. The tax in question is designated in the Act as "a franchise tax" and is expressly stated to be, by the provisions of Section 8, "in lieu of all other *franchise* taxes" against taxpayers coming within the provisions of the Act.

2. The character of the tax imposed by this Act has been defined by the Courts of New Jersey on several occasions. *North Jersey Street Railway* v. *Jersey City*, 73 N. J. L. 481; affirmed, 74 N. J. L. 761; *Bergen Aqueduct Co.* v. *State Board of Taxes and Assessment*, 95 N. J. L. 486; *Eastern Pennsylvania Power Co.* v. *State Board of Taxes and Assessment*, 103 N. J. L. 281.

In *North Jersey Street Railway Co.* v. *Jersey City*, *supra*, Mr. Justice SWAYZE, when the case was before the Supreme Court, said (73 N. J. L., p. 483):

> "We think the tax on gross receipts *is not a property tax*, but a *license tax* imposed by the state as a condition precedent to the exercise of special privileges in the streets."

When the case came to the Court of Errors and Appeals, Mr. Justice PITNEY said (74 N. J. L. 765):

> "We agree with the Supreme Court that this tax on gross receipts *is not a property tax but a license fee* imposed as a condition upon which the enjoyment of special privileges in the streets is made to depend."

In *Bergen Aqueduct* v. *State Board of Taxes*, *supra*, Mr. Justice MINTURN, speaking for the Court of Errors and Appeals, said at page 489:

> "The fundamental rule is settled beyond controversy that the state may require *as the condition of*

> *a grant to do business* to a corporation, payment of a specific sum *based on the gross receipts.*"

This is, of course, but another way of saying that the tax imposed by the Act of 1900 is a license tax.

In *Eastern Pennsylvania Power Co.* v. *State Board, supra,* Mr. Justice BLACK, speaking for the Supreme Court, said:

> "The tax imposed under this statute is *a license tax pure and simple.*"

The nature of the tax on the gross receipts of street railway companies imposed by a similar statute passed in 1906 (P. L. 1906, p. 644; before the passage of that act street railways had been taxed under the Act of 1900), was considered by the Supreme Court in *Phillipsburg Horse Car R. R. Co.* v. *State Board of Assessors,* 82 N. J. L. 49. The two statutes are so similar that the decision may be taken as an authority under the Act of 1900. Mr. Justice TRENCHARD, speaking for the Court, traced the history of the legislation and points out that the Act of 1884 (P. L. 1884, p. 235) was the predecessor of the Act of 1900 and the Act of 1906. He says (p. 54):

> "It appears, therefore, that the tax measured by gross receipts which was first imposed on the street railway companies under the Act of 1900, and continued by the Act of 1906, was imposed in lieu of the tax upon the franchise to exist as a corporation assessed under the Act of 1884."

And from this he concludes (p. 55):

> "We hold, therefore, that the tax in question is not levied on the gross receipts of the corporation

> nor on the business of the corporation, but is merely an *excise tax* on the franchise of the corporation, viz, the franchise to exist and the franchise to occupy the streets, which is measured in part by the gross receipts."

The Act of 1906, referred to by *Mr. Justice* TAWNEY, laid a two per cent gross receipts tax on telephone companies and in the opening paragraph designated the tax as

> "An annual tax, for the use of the State, by way of a *license* for its corporate franchise, as hereafter mentioned."

In the present case, *Mr. Justice* BLACK, after stating that the Supreme Court felt bound to follow the *Philadelphia* case, *supra*, and that it was rightfully decided, proceeded to find a justification for the tax under decisions of this Court other than *Maine v. Grand Trunk Railway Co.*, *supra* (142 U. S. 217), upon which the Court in the *Philadelphia* case relied. He said:[1]

> "The State distinguishes the cases above cited from the present case and urges, in the case at bar, the tax in question is the only one imposed by statute upon the property right, i. e., the franchise right of the prosecutor, to use the public streets, and that, in valuing that property right account may be taken under the doctrine in the case of the United States Express Co. v. State of Minnesota, 223 U. S. 335, of the total receipts of which the employment of such special franchise gives rise, including receipts from interstate commerce, or as expressed by *Mr. Justice* VAN DEVANTER, in the case of Cudahy Packing Co. v. State of Minnesota, 246 U. S. 450, it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as an

[1] P. 2.

> index or measure of the *value of the property* for taxing purposes. We think that is the situation in this case. The method adopted for calculating the tax, viz., the gross earnings being taken merely as a measure of the *value* of the franchise of the prosecutor." (Italics ours.)

From the above quoted language, it would at first seem that the Supreme Court, in the case at bar, considered the tax in question as one on property as distinguished from a license tax. When it is remembered that the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals on the opinion of Mr. Justice Black, it would also appear that the Courts of New Jersey, *in order to sustain the tax in question*, have completely reversed the position which they first took in 1906 in *Building North Jersey Street Railway v. Jersey City*, *supra*, and continuously maintained and reiterated through 1907 when *Eastern Pennsylvania Power Co. v. State Board of Assessors*, *supra*, was decided.

On the other hand, the expressed concurrence in the decision in the *Phillipsburg* case (which as before stated was based on the theory that the tax was a *license tax*) would seem to indicate that the Court also considered the tax as a license tax. We are, therefore, confronted with a decision which, from our viewpoint, is not only in conflict with the uniform line of decisions extending over a period of more than twenty years, but which seems to be at variance with itself. For these reasons, and another which we will presently mention, we do not think that the New Jersey Courts intended, in the case at bar, to hold the tax as one on property but rather misconceived the purport of the decisions of this Court which are cited in the before-quoted part of Mr. Justice Black's opinion. This is more manifest when the following is considered:

The Constitution of New Jersey (Article IV, Section VII, Paragraph 12) provides that:

> "Property shall be assessed for taxes under general laws and by uniform rules according to its true value."

In *North Jersey Street Railway Co.* v. *Jersey City*, *supra*, in which decision the Court of Errors and Appeals concurred (74 N. J. L. 761, *supra*), Mr. Justice Swayze, speaking for the Supreme Court, said in considering whether the Act of 1900 was in conflict with this provision of the State Constitution (pp. 402, 403):

> "The objections to the constitutionality of the Act are two—first, that a tax upon gross receipts is not a tax according to true value as required by the Constitution, for the reason that the percentage of gross receipts must be levied though the exercise of the franchise may actually involve a loss and the franchise may be of no value; second, that the Act attempts to provide two different methods of taxation for the property of the corporation—one by local assessors according to its value, the other an arbitrary imposition by a State Board. The first objection is fatal to the validity of the Act if the franchise tax is to be imposed as a *property tax*; if it is not a property tax, the second objection is without force.
>
> *We think the tax on gross receipts is not a property tax, but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets.*" (Italics ours.)

*And again* (p. 405):

> "We ought not, unless compelled, to adopt a construction which would make the Act a clear violation of the constitutional requirement that property be assessed at its true value. * * * That the legisla-

ture *did not* intend the tax on gross receipts to be a *property tax* is indicated by the distinction made between property and franchises throughout the Act." (Italics ours.)

It thus appears that the Supreme Court as the Court of Errors and Appeals have expressly held that if the tax in question were a property tax, it would be invalid under the Constitution of New Jersey. There is no intimation in the opinion in the case at bar, of an intention on the part of the Courts of New Jersey to depart from this conclusion. Indeed it is difficult to see how they could do so.

We respectfully submit, therefore, that under the decisions of the courts of New Jersey, the tax in question is a license tax, and if it were a property tax it would be invalid under the State Constitution.

2. It is well settled, however, that this Court will determine for itself the nature of a tax which is claimed conflicts with the Federal Constitution.

*Galveston, etc. Ry. Co. v. Texas*, 210 U. S. 217, 227;

*Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294;

*Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 403;

*The Hamilton Co. v. Massachusetts* (ruled May 27, 1929), 279 U. S. 630. Rehearing denied Oct. 14, 1929.

There are a number of considerations which we submit, must lead this Court independently to the conclusion that it is in truth and reality a license tax and was intended.

(a) The tax in question in this case has [illegible] tax on the business of the appellants a license

tax. The language of Section 4 of the Act of 1900 is: "and the franchise tax * * * for *business* so done in this state shall be * * *, etc." Again, the tax is dependent upon the *amount of business done*, and as was stated in the opinion in *North Jersey Street Railway* v. *Jersey City*, *supra*, the percentage of gross receipts must be levied as a tax, although the franchise may be of no value.

Appropriate to this reasoning is the language of Chief Justice Shepp of the Court of Appeals of the District of Columbia, in the case of *Security Savings and Com. Bank* v. *District of Columbia*, 279 Fed. Rep. 185. There the Court construed a gross earnings tax, based in part upon revenues derived from tax-exempt government bonds, levied against savings banks as a *franchise* tax. The Court said at page 186:

> "Appellant says the tax is a property one. If so, it is invalid. About this there is no contention."

But the District asserted that it was a franchise tax, and as such was valid. In this connection the Court said that the United States Supreme Court had considered the subject in a number of cases involving statutes not in precisely the same language as the one before it, which cases were cited. Then continuing it said (pp. 186, 187):

> "It will be observed that the paragraph we are considering imposes upon the corporation the *duty of paying* the tax, and provides that the amount shall be determined by the sum of the *gross earnings*. If there are no earnings, there will be no tax, no matter how much property the corporation may own, and there will be no earnings unless business is done. The amount of the tax fluctuates with the quantity of business transacted, and is measured by it. This indicates an intention to tax the *doing of business*, and *not the*

*property;* hence the tax is a franchise tax. Thus reasons the Supreme Court of the United States in the decisions just referred to." (Italics ours.)

The same construction was given to the Act before the Court in that case in *Potomac Elec. Power Co.* v. *Rudolph*, 29 Fed. Rep. (2d) 634 (decided Nov. 5, 1928), in which case a certiorari was denied, 278 U. S. 656. See also *Dist. of Columbia* v. *Riggs Nat. Bank*, 30 Fed. (2d) 873; certiorari denied 279 U. S. 846.

(b) That it was not the *intention* of the Legislature to measure the value of the franchise considered as property by the gross receipts, and thus to impose a property tax, is shown by the following consideration. The basis of the tax is a proportion of the total gross receipts in the ratio that the *line* mileage in the streets and highways bears to the company's total *line* mileage. By the method prescribed by an amendment to the Statute in 1927 (P. L. 1927, p. 367), as construed and applied, a mile of line is a mile of line *irrespective of the number of wires* in such line. One line may carry a single pair of wires and another may carry a number of cables with several thousand pairs of wires. The gross receipts per mile in the latter case would be many times those in the former case, and consequently if the basis for determining the value of the right to use the streets is line mileage, the gross receipts cannot have any relationship thereto. They may be and are a measure of the value of the business done, and this points inevitably to the conclusion that the tax was intended to be a *license tax and not a property tax.*

(c) While it happens to be true in this case that all the lines of appellant lie wholly within the state of New Jersey, the statute expressly contemplates and applies to the case

of a company whose lines extend into and throughout other states and provides for the allocation to the state of New Jersey of the entire gross receipts of the system in the ratio that the line mileage on the highways of New Jersey bears to the total line mileage of the system. (See Sc. 4 of the Act, Appendix A.) These provisions may be looked to in order to ascertain the legislative intent. The amount of business carried on over telephone lines is proportional of course to the number of wires and not to the length of line, and the number of wires may vary from two open wires on a pole to more than a thousand wires in a single cable and to several thousand wires when several cables are carried in a single conduit. If the average number of wires per mile of line in New Jersey is half that in Pennsylvania, for example, the allocation of the gross receipt of the New Jersey-Pennsylvania system to the state of New Jersey on the basis of line mileage results in imputing to New Jersey for tax purposes gross receipts earned in Pennsylvania. It is obvious therefore that the legislature could not have thought that it was dealing with property values for taxation in enacting this statute.

(d) In cases where the gross receipts are resorted to, to measure a property tax, *only* those receipts derived from the use of the property that ought to be taxed are properly to be considered. *Here however the receipts from the entire property real, personal and mixed including the receipts from the use of the franchises, are taken as a measure of the value of the "franchise".* The gross receipts are derived not only from the use of lines but also from buildings, machinery, equipment, cash and the vast array of assets put by the telephone company to productive use in its business. The earnings from all this vast property are by the method provided in the statute considered

as producing earnings attributable to the lines on the highway alone and to measure the value of the mere right to use these lines. Obviously this is in direct disregard of the cardinal test above referred to, that the earnings taken must bear a direct relation to the property to be taxed by the substituted property tax.

(e) A further important circumstance to be noted is the fact that under the Act of 1884 (referred to in the *Phillipsburg* case) the tax was at the rate of 2%; that rate was continued by the subsequent amendatory acts down to the Act of 1917, *supra* (which amended the original Act of 1900) when a sliding scale was provided, under which the tax was increased 1% each year until it reached 5%, the present rate. It thus appears that the rate now in effect is the result of a sliding upward scale imposed in advance, and when it could not possibly be known whether such a sliding scale would produce a tax commensurate with the ordinary tax on other property. The imposition of such a fluctuating rate negatives the idea of a bona fide effort to impose a property tax designed to equate the tax on this species of property with the ordinary tax on all other property, by uniform and equal rules throughout the state, as required by the state constitution.

(f) Another feature of the Act which tends to deprive it of the character of a true property tax is the allowance in Section 7 of a credit against the tax computed at the statutory rate of any payment by the taxpayer to the municipality, pursuant to any contract providing therefor. Such a credit provision destroys the character of the tax as a property tax and subjects it to criticism as ununiform and hence unconstitutional.

(g) In conclusion, we submit, that this court should be loath, indeed, to hold this to be a property tax in view of

the express holding of the New Jersey courts in *North Jersey Street Railway Company* v. *Jersey City, supra,* (73 N. J. L. pages 481-483; 74 N. J. L. pages 761-765), that if it were a property tax it would violate the before quoted provision of the New Jersey Constitution.

We therefore submit that by the (a) language of the Act itself and (b) the construction given to it by the courts of New Jersey for over 20 years, (c) together with its inherent characteristics, the tax under consideration is a license tax and not a property tax. As pointed out at the beginning of the discussion under this point the tax is in addition to and not in lieu of the ordinary *ad valorem* tax on appellant's real and personal property; and is imposed at a fixed rate on the gross receipts derived in part from interstate commerce.

## II.

**The tax in question being of the kind and having the characteristics set forth in the next preceding point is a direct tax on gross receipts derived from interstate commerce, and is, therefore, to that extent, an invalid regulation of or burden upon such commerce, as is also the statute which authorizes its imposition.**

In the old and often cited case of *Philadelphia & Southern Mail Steamship Company* v. *Pennsylvania*, 122 U. S. 326, the State of Pennsylvania assessed a tax upon the *gross receipts of a steamship company, incorporated under its laws,* which were derived from the transportation of persons and property by sea between different states, and to and from foreign countries. It was held that this amounted to a regulation of interstate and foreign com-

merce in conflict with the Federal Constitution. The question was examined from all of its angles. Mr. Justice BRADLEY said (p. 336):

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

* * * * * * *

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> "The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principal so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence."

In *Galveston, etc., Railway Company* v. *Texas*, 210 U. S. 217, Mr. Justice HOLMES, referring to *Philadelphia & Southern Steamship Company* v. *Pennsylvania*, *supra*, said (p. 224):

> "We regard this decision as unshaken and as stating established law."

In *Lyng* v. *Michigan*, 135 U. S. 161, Chief Justice FULLER said (p. 166):

> "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, *or on the receipts derived from that transportation, or on the occupation or business of carrying it on*, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." (Italics ours.)

There are many cases holding that the exaction of a license fee by a state or municipality from one engaged in interstate commerce, although he or it may also be engaged in intrastate commerce, conflicts with the Commerce Clause of the United States Constitution, among which may be cited *LeLoup* v. *Mobile*, 127 U. S. 640 (where the tax was imposed on an agent for a telegraph company); *McCall* v. *California*, 136 U. S. 104 (where it was sought to exact a license fee from a railroad maintaining an agency having no lines within the state); *Norfolk & Western Railroad Co.* v. *Pennsylvania*, 136 U. S. 114 (where a railroad company having no line within the state was required to pay a license tax because it had an office there); *Crutcher* v. *Kentucky*, 141 U. S. 47 (where a license fee was exacted from an agent of an express company engaged in both intrastate and interstate commerce); *Williams* v. *Talladega*, 226 U. S. 404 (where a municipality attempted to exact a license fee from a telegraph company engaged in both intrastate and interstate business); *Hyman* v. *Hayes*, 236 U. S. 170

(where a privilege tax was imposed on a person engaged in soliciting orders for liquor which was manufactured in the state that imposed the tax, and shipped to other states); *Barrett* v. *New York*, 232 U. S. 14 (where an attempt was made to compel express companies engaged in both intrastate and interstate business to take out a license); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (where a license tax, both flat and based on gross receipts, was imposed upon wholesale and retail dealers in goods, wares and merchandise); *Bowman* v. *Continental Oil Co.*, 256 U. S. 642 (where the tax was the same as in the last cited case but assessed against vendors of gasoline); and *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, (where a franchise tax was based on a percentage of the capital stock and surplus employed by a pipe line company in the state). In this latter case Mr. Justice SUTHERLAND, at page 562, stated the rule as stated in *Lyng* v. *Michigan*, ~~supra~~.

In *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, there was involved a Massachusetts statute which provided that every foreign corporation should pay an annual "*excise* equal to the sum of $5 per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "2½ per cent. of that part of its net income which is derived from business carried on within the Commonwealth." The question in the case was thus stated by Mr. Justice MCREYNOLDS, who wrote the opinion (p. 216):

> "The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a state impose upon a foreign corporation which transacts *only* interstate business within her borders an *excise* tax measured by a combination of two factors—the proportion of the total value of

capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?" (Italics ours.)

After an examination of the authorities, the question was answered in the negative. He quoted with approval the general rule laid down by Chief Justice FULLER in *Postal Telegraph* v. *Adams*, 155 U. S. 688, at 695, which is the same as that above quoted from *Lyng* v. *Michigan*.

The general rules have been summed up fairly recently by Mr. Justice VAN DEVANTER in *Pullman Co.* v. *Richardson*, 261 U. S. 330, as follows, at page 337:

> "The principles to be applied in cases of this class repeatedly have been considered by this court and are now settled.
>
> A state can neither tax the act of engaging in interstate commerce, *nor lay a tax on the gross receipts therefrom*. In either case the tax would be a restraint or burden on such commerce, and its imposition an invasion of the power of regulation confided to Congress by the commerce clause of the Constitution (*citing cases*).
>
> The rule is otherwise with *property* used in interstate commerce. A state within whose limits such property is permanently located or commonly used may tax it (*citing cases*).
>
> And, if the *property* be part of a system, and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the state; in other words, the tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system (*citing cases*).
>
> In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from

> its use in both intrastate and interstate commerce, as an index or measure of its value, and if the means do not involve any discrimination against interstate commerce, and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce" (citing cases). (Italics ours.)

In the very recent case of *Sprout* v. *South Bend*, 277 U. S. 163, Mr. Justice Brandeis, referring to "an occupation tax"—one for the privilege of engaging in a certain occupation—assessed against those engaged in both intrastate and interstate commerce, said at page 171:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; *that the amount exacted is not increased because of the interstate business done;* that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business." (Italics ours.)

Of course, there is no difference in principle between a tax imposed by a state or a municipality for the privilege of engaging in a certain business and a tax, such as the one at bar, imposed for the privilege of using the public streets and highways. In either case, the tax is a *license* tax as distinguished from a *property* tax. The tax here fails to meet any one of the four tests laid down in the foregoing quotation, although to be valid it must meet all of them.

As before stated the first decision of the New Jersey Courts which sustained an act in all respects similar to that now in question (*Philipsburg Horse Car R. R. Co.*

v. *Assessors,* 82 N. J. L. 49) was rested upon what it was thought that this Court had decided in *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217. We shall not attempt to analyze the latter decision except to note that it was decided by a five to four vote. It is discussed and considered at length in the later case of *Galveston, etc., Co.* v. *Texas, supra* (210 U. S. 217). In *Flint* v. *Stone Tracey Co.,* 220 U. S. 107, at 165, it is said to have been *interpreted* in the latter decision.

It was said by Mr. Justice Holmes, who wrote the opinion in the *Galveston* case, that the tax which was sustained in *Maine* v. *The Grand Trunk Railway,* was a *property* tax—not a *license* tax. The tax involved, based upon gross earnings, was a tax *in lieu of* all other taxes on the railroad property, other than the buildings and the lands and fixtures located outside the right-of-way, and the Court said (p. 226):

> "The estimated gross receipts per mile may be said to have been made the measure of the value of the property per mile."

This it will be seen was an entirely different application of the gross earnings tax from that applied in the *Philadelphia Steamship* case and also from that applied in the *Galveston* case.

Adopting the construction of Mr. Justice Holmes, we submit that the tax in question in the case at bar cannot be sustained under *Maine* v. *Grand Trunk Railway,* because the tax in question is not a substituted property tax.

We would direct attention, at this point, to the fact that in the opinion of the New Jersey Supreme Court in the case at bar, it is stated that the present appellant *relies* upon, among other cases, *Maine* v. *Grand Trunk Ry. Co.* Our position regarding that case was the same in the New

Jersey Courts as it is here. We not only did *not rely* upon it but we sought to distinguish it and show that the reliance of the New Jersey Supreme Court upon it in a previous case (*Phillipsburg, etc.* v. *Assessors, supra*) was wrong.

Nor can the tax be distinguished from that which was held to be invalid in the *Galveston* case. There a statute of Texas imposed upon railroads:

> "an annual tax for the year 1905 and for each calendar year thereafter equal to one per centum of its gross receipts if such line of railroads lies wholly within the state."

The lines of the railroads concerned were wholly within the state but they connected with other lines, and a part of the gross receipts was derived from the carriage of passengers and from freight coming from or destined to points without the state. The railroads contended that such receipts could not be taxed under the rule announced in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania.* Mr. Justice HOLMES said (p. 227):

> "The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature

and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form" (citing cases). "We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The distinction between a tax 'equal to' 1 per cent. of gross receipts, and a tax of 1 per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to'.

"Of course, *it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state.*" (Italics ours.)

Again in *Meyer, etc., of Oklahoma* v. *Wells Fargo & Co.*, 223 U. S. 298, this court condemned a tax assessed pursuant to a statute of Oklahoma on the gross receipts of an express company in so far as the receipts were derived from interstate commerce, and reiterated the principle laid down in the *Galveston* case, *supra*. The statute as set forth in the opinion provided as follows:

"'Every corporation hereinafter named shall pay the state a gross revenue tax * * * which shall be in addition to the taxes levied and collected upon

> an ad valorem basis upon the property and assets of such corporation equal to the per centum of the gross receipts hereinafter provided, if such public-service corporation operate wholly within the state, and if such public-service corporation operates partly within and partly without the state, it shall pay tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the state bears to the whole of its business'; with a proviso for fixing a different proportion if it 'more fairly represents the proportion which the gross receipts of any such public-service corporation for any year within this state bear to its total gross receipts.' "

It is, we submit, quite impossible to distinguish the tax in the case at bar from that which was condemned in the *Wells Fargo* case. Both are license taxes directly on gross receipts partly derived from interstate commerce, and are in addition to the ordinary *ad valorem* taxes.

Since the New Jersey Supreme Court in the case at bar relies on *United States Express Company* v. *Minnesota,* 223 U. S. 335, and *Cudahy Packing Company* v. *Minnesota,* 246 U. S. 450, attention is directed to the fact that this court found the tax in each of those cases not to be a license tax, but a tax *in lieu of all taxes* against the *properties* of the corporation,—*a substituted property tax*—and not greater than ordinary taxes would be. As heretofore shown, the tax in question here, is a *license* tax, not a *property* tax, and not *in lieu of* all taxes against the properties of appellant. It will be borne in mind that the New Jersey statutes impose an *ad valorem* tax against all of the real and personal property of the appellant (see Section 2 of the Act of 1900—Appendix "A"). The distinction, we submit, is vital and renders those decisions inapplicable to the case at bar.

In the court below, the appellee seemed to make some point of the fact that the appellant is a domestic corporation; as it did also that the validity of interference with interstate commerce was in a measure dependent upon the *degree* of the interference.

The fact that the appellant is a domestic corporation is of no moment because it has been definitely settled that a state has no more power to regulate or burden the interstate commerce of a domestic corporation than that of a foreign corporation. *Ozark Pipe Line* v. *Monier* (266 U. S. 555-567); *Galveston, etc., Co.* v. *Texas, supra* (210 U. S. 217-228).

Likewise, the degree of interference is of no importance. *Alpha Cement Company* v. *Mass.*, 268 U. S. 203. *The controlling factor is the character of the tax.*

It is accordingly submitted, that as the tax in question is not a substituted or commuted property tax but a license tax, it is a direct tax upon the gross receipts of appellant derived from interstate commerce, and is therefore an unlawful regulation of or burden upon that commerce.

## III.

**Even if the tax in question can be deemed a property tax it is invalid, in that it violates the Commerce Clause of the Federal Constitution.**

The general principles are clear. The state may lay a property tax upon property permanently located or commonly used within its limits and the fact that the property is used in interstate commerce does not exempt it from such taxation. Instead of taking the *form* of an ordinary property tax, that is, tax rate applied to assessed valuation, the tax may be measured by a percentage of the gross receipts

from the use of the property. If the receipts from its use in interstate commerce are included, the tax can be sustained only as a property tax and not as a gross earnings tax, and will be sustained only upon the theory and in the event that the earnings taken may fairly be regarded as an index or measure of the value of the property taxed, and that the tax imposed is in lieu of and not greater than the ordinary property tax. And if the tax measured by gross receipts is one in addition to the ordinary property tax it is manifestly void.

Some examples of this kind of a tax conforming to the foregoing principles are the following:

The California tax on the gross earnings of public service corporations (Polit. Code, § 3664a) construed in *Pullman Co.* v. *Richardson, supra.* The rate on telephone companies is 5½ per cent.

The Connecticut tax on the gross receipts of public service corporations (G. S. 1918, § 1380). The rate on telephone companies is 4 per cent.

The Maine tax, construed in *Maine* v. *Grand Trunk Ry., supra* (R. S. 1916, ch. 9, § 36). The rate on telephone companies is at a graduated rate of from 1¼ per cent. to 6 per cent.

The Minnesota tax construed in *U. S. Exp. Co.* v. *Minnesota,* and *Cudahy Packing Co.* v. *Minnesota, supra* (G. S. 1923, § 2233, *et seq.*). The rate on telephone companies is 4 per cent.

The Rhode Island tax (G. L. 1923, ch. 38). The rate on telephone companies is 2 per cent.

The Wisconsin tax, construed in *N. W. Mut. Ins. Co.* v. *Wisc.,* 247 U. S. 132, 138 (Wisc. Stat. 1927, ch. 76). The rate on telephone companies is graduated from 2½ per cent. to 5 per cent.

In all these cases the gross earnings tax is in lieu of all other taxes upon the property of the company and is no more than the ordinary *ad valorem* tax imposed upon the property of other taxpayers and as such has been sustained by this Court.

Examples of taxes of this kind, which have failed to conform to the principles stated and so have been condemned are the Texas tax, construed in *Galveston, etc., Ry.* v. *Texas, supra,* and the Oklahoma tax, construed in *Meyer* v. *Wells Fargo, supra.*

The tax in the case here in judgment falls in this latter class and must be similarly condemned.

In the first place there is nothing in the words of the statute even remotely suggesting that the legislature intended this as a property tax, either in lieu of the ordinary property tax or otherwise. The plain import of the words used, as well as the nature and effect of the tax evidence a contrary intent, all of which we have pointed out *supra.*

In the second place all the physical property, real and personal, owned or used by the appellant is subjected to the ordinary property taxes levied generally upon the property of others throughout the state. It is assessed the same as other property and taxed at the same rates. This fact precludes the idea that this tax was to be a substituted or commutation tax, such as admits the inclusion of the receipts from interstate commerce in the basis. It is a tax plainly and expressly superimposed upon the full ordinary property tax.

The state's theory seems to be that after all this property has been valued as and where found and has been taxed dollar for dollar as other property in the state is taxed, there remains a further property value residing in the franchise to have and maintain a part of the poles,

wires, cables, conduits, etc., in the streets and highways, and that this *fragment* of property value is measurable by the gross receipts derived from the whole of the property, consisting of the property in the streets and similar property off the streets, and all the company's lands, buildings, and expensive central office and other equipment therein and working cash, materials and supplies, and that the state may tax such gross receipts, including those from interstate commerce, at the arbitrary rate of 5% a year, without encountering the condemnation of the Commerce Clause of the Constitution.

Upon this theory any one of the states referred to above as now having gross receipts taxes conforming to the principle of the lieu-tax may, by the artful use of a few words amending the statute, lay the ordinary *ad valorem* property tax upon all the real and personal property of telephone companies and at the same time retain the present gross receipts tax, making it one solely for the right to have and maintain telephone lines in the streets and in lieu of any other tax upon that right, thus evading the constitutional limitations imposed upon the taxing power of the states by the Commerce Clause.

The effect of the application of this theory to the facts of this case may be shown by the following computations. If we apply to the total assessed value of the property in the highways the average rate of *ad valorem* taxation as compiled by the State Board of Taxes and Assessment for the year 1928, viz. $3.877 per $100.,[19] it will produce a tax upon such property of $1,586,928.

The gross receipts tax alone amounts to $1,058,997. It thus appears that if this tax be considered as a property tax

[19] Thirteenth Annual Report of the State Board of Taxes and Assessment 1928—p. 9.

upon the franchise it would require appellant to pay a tax upon the mere right to use the highways equal to two thirds of the tax upon the physical property located therein. Or stated another way it would work out a value of the right to use the streets of two thirds the value of the property itself in the streets. In addition, as pointed out by Mr. Justice SWAYZE in *New Jersey Street Railway Company* v. *Jersey City, supra,* gross receipts can never measure the true value of a franchise because "the exercise of the franchise may actually involve a loss and the franchise may be of no value" although the gross receipts may be large.

We earnestly urge that if the mere statement of the theory does not refute it, the result of its application in the case at bar, as illustrated above, makes such a conclusion inevitable. If such a tax can be sustained, and if the state's theory is sound, it is difficult to see how any real protection to interstate commerce against state taxation remains. This tax has already been increased from 2% to 5% of the gross receipts. Suppose the legislature should now increase it to 10%. What protection to interstate commerce can the courts give, under the state's theory? The courts cannot set aside the tax merely because they deem it excessive, unless they have a legal test to apply, and under the state's theory there is no such test. Under the law as we understand it and have stated it above, there is such a test. The tax may not be more than the reasonable and fair equivalent of the ordinary property tax, for which it is a substitute. The taxpayer can always compare the tax measured in this way with the ordinary property tax. This is an understandable, reasonable, and workable rule. The ultimate measure is the ordinary property tax, but the law permits the state to substitute the measure

of gross receipts, upon the condition that the latter measure is so applied as to reach a result that is a fair equivalent, since in that case it can be seen that no burden is cast upon interstate commerce.

It would probably be correct to say that a telephone system could not exist at all, as a practical matter, without the right to run the lines through the streets. This right being indispensable, a *sine qua non*, the property might be said to have no value without that right. But value of property for taxation cannot be determined upon any such basis as that. See *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282.

## CONCLUSION.

In conclusion we deem it appropriate to suggest that if it be admitted that the fragment of the total property here in question be held subject to the application of the principle of the lieu-tax and hence that this fragment may be taxed by reference to the entire earnings from all the property of appellant, then other fragments of the total property may be similarly treated and we should have a series of taxes, each at a fixed rate applied to the entire gross earnings, including the earnings from interstate commerce. We submit that such a situation would totally destroy the principle of the lieu-tax, which this court has developed as a means of enabling the states to require interstate commerce to "pay its way", while at the same time maintaining the integrity of the Commerce Clause.

**It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be reversed.**

Respectfully submitted,

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FRANKLAND BRIGGS,
THOMAS G. HAIGHT,
ALFRED E. HOLCOMB,
LEONARD A. SWENEY,
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## Appendix A.

An act for the taxation of all the property and franchises of persons, co-partnerships, associations or corporations using or occupying public streets, highways, roads or other public places, except municipal and corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and except corporations taxable under the act entitled "An act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State," approved May twenty-third, one thousand nine hundred and six. (P. L. 1900, p. 502, as amended by P. L. 1917, p. 42.)

Sec. 1. All the property, real and personal, and franchises of all persons, co-partnerships, associations or corporations, other than municipal or corporations taxable under the act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, and other than corporations taxable under the act entitled "An act for the taxation of the property and franchises of street railroad corporations using or occupying public streets, highways, roads, lanes or other public places in this State," approved May twenty-third, one thousand nine hundred and six, or any of the supplements or amendments thereto, which have acquired or may hereafter acquire authority or permission from the State or from any taxing district thereof, and have or may hereafter have the right to use or occupy and occupying the streets, highways, roads, lanes or public places in this State, shall hereafter be valued, assessed and taxed as hereinafter provided. (P. L. 1900, p. 502, as amended by P. L. 1917, p. 42.)

Sec. 2. The respective assessors or officers, having like powers and duties to perform, in each taxing district in

this State, shall each year ascertain the value of such property located in, upon or under any public street, highway, road, lane or other public place in each taxing district, and the value of the property not so located; when so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law, and all proceedings for appeal, review and collection now available shall remain applicable. (P. L. 1900, p. 502.)

Sec. 3. The officers, whose duty it is to make the assessment in each taxing district, shall annually make a return, certified in writing, on or before January tenth in each year, of the valuation of all property assessed under the provisions of this act which is located in, upon or under any street, highway, road, lane or other public place in such taxing district, together with the names of the owners and those operating the same, and file the same in the office of the county board of taxation. The county board shall certify to the State Board of Taxes and Assessment a copy of the same on or before February twenty-eighth in each year. (P. L. 1900, p. 502, as amended by P. L. 1918, p. 907.)

Sec. 4. All such persons, copartnerships, association or corporations subject to taxation under the provisions of this act shall, on or before February first in each year, return to the State Board of Taxes and Assessment a statement showing the gross receipts of their business over, on, in, through or from their lines or mains in the State of New Jersey for the year ending December thirty-first next preceding; any person, co-partnership, association or corporation having part of his, her or its lines or mains in this State and part thereof in another State or States, or having part of his, her or its lines or mains on private property and part thereof on public streets, highways, roads, lanes or other public places, shall make a report showing the gross receipts of his, her or its business over, in, on and from the whole line or mains, together with a statement of length of the whole line or mains and the length of the line or mains in this State along any street, highway, road, lane or other public place; and the franchise tax of such person, copartnership, association or corporation for business so done in this State, shall be upon such proportion

of such gross receipts as the length of the lines or mains in this State, along, in, on or over any street, highway, road, lane or other public place bears to the length of the whole line or mains, all such statements or reports shall be subscribed and sworn to by the person, copartners or the president, vice-president or chief officer of each association or corporation; any person, copartnership, association or corporation, neglecting or refusing to make such annual statement or report shall forfeit and pay to the State of New Jersey the sum of one hundred dollars for each offence, to be recovered in an action of debt, in the name of the State, and when recovered shall be paid into the State treasury; it shall be the duty of the State Board of Taxes and Assessment to certify any such default to the Attorney-General of the State, who thereupon shall prosecute an action at law for such penalty; any person who shall falsely make any oath required to be made under this act shall be deemed guilty of perjury, and, on conviction thereof, liable to all penalties prescribed by law therefor. (P. L. 1900, p. 502, as amended by P. L. 1927, p. 567.)

Sec. 5. An annual franchise tax upon the annual gross receipts as aforesaid, upon all persons, co-partnerships, associations or corporations taxable under this act, shall be assessed as follows: the tax levied and assessed during the year one thousand nine hundred and seventeen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and sixteen, shall be two per centum; the tax levied and assessed during the year one thousand nine hundred and eighteen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and seventeen, shall be three per centum; the tax levied and assessed during the year one thousand nine hundred and nineteen computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and eighteen, shall be four per centum; the tax levied and assessed during the year one thousand nine hundred and twenty computed upon the gross receipts of the year ending December thirty-first, one thousand nine hundred and nineteen, shall be five per centum; the tax levied and assessed annually thereafter shall be five per centum upon the gross receipts of the year ending De-

cember thirty-first next preceding; *provided,* that those persons, co-partnerships, associations or corporations, whose gross receipts shall not exceed the sum of fifty thousand (50,000) dollars, shall be assessed at the rate of two per centum per annum upon such gross receipts. (P. L. 1902, p. 503, as amended by P. L. 1917, p. 42.)

Sec. 6. The State Board of Taxes and Assessment shall annually ascertain and apportion the franchise tax to the various taxing districts in proportion to the value of the property located in, upon or under any public street, highway, lane or other public place therein, as shown by the statements so filed with said board; but the State Board of Taxes and Assessment shall have the power to inquire into, equalize and revise the valuations returned to them in said statements by the county boards of taxation, and to fix the valuations for that purpose for any taxing district which shall fail to file its return within the time required by law, so as to secure an equitable and fair valuation and apportionment of said franchise tax upon a uniform basis of valuation between the various taxing districts entitled thereto; the amount of the franchise tax shall be certified in writing to the respective collectors of taxes or officers having like power and duties to perform on or before May first in each year; *provided,* that no change in the apportionment of the franchise tax shall be made after the apportionment by the said State Board of Taxes and Assessment as aforesaid, except by and with the consent in writing of the assessors of the taxing district, whose proportion of the franchise tax would be reduced by such change, and all such changes heretofore made by such board with such consent are hereby validated; the collectors of taxes shall within five days after being so notified of such franchise tax, deliver or cause to be delivered, to each person, co-partnership, association or corporation taxable under the provisions of this act, a statement in writing showing the amount of such franchise tax so ascertained, which shall become due at the time and place when and where other taxes are due and payable in such taxing district, and the tax shall be and remain a first lien on the property and

assets of such person, copartnership, association or corporation, on and after December first following its assessment, until paid with interest and penalty thereon, and shall be collected in the same manner that other taxes are collected, and subject to the same discounts and penalties, and the same proceedings now available for the collection of other taxes shall remain applicable to the collection of the franchise tax. (P. L. 1900, p. 502, as amended by P. L. 1927, p. 567.)

Sec. 7. All money now payable by any person, co-partnership, association or corporation to any taxing district for its exclusive use pursuant to any contract, agreement, resolution or ordinance (except money expended for paving or repairing any street, highway or other public place, or taxes upon property, real and personal), shall be paid, notwithstanding this act, and when paid shall be considered a payment on account of, or in full, as the case may be, for the franchise tax to be apportioned according to the provisions hereof; if the amount so payable is greater than the amount of the franchise tax to be so apportioned, such payment shall be in lieu thereof; and if less, the difference in amount shall be payable as herein provided. (P. L. 1900, p. 504.)

Sec. 8. The franchise taxes imposed by this act shall be in lieu of all other franchise taxes now assessed against the persons, co-partnerships, associations or corporations, subject to the provisions of this act and their property. (P. L. 1900, p. 504, as amended by P. L. 1902, p. 477.)

Sec. 9. None of the provisions of this act shall be construed as in anywise to alter, impair or repeal any of the provisions of an act entitled "An act for the taxation of railroad and canal property," approved April tenth, one thousand eight hundred and eighty-four, or any of the supplements or amendments thereto, nor shall any corporation taxable under said act and the supplements and amendments thereto be taxable under this act; if any provision of this act shall, for any reason, be held to be unconstitutional or invalid it shall not affect the other provisions of this act or any of them. (P. L. 1900, p. 505.)

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# Supreme Court of the United States

**October Term, 1929.**

**No. 254.**

NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant,*

vs.

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
*Appellee.*

On Appeal From the Court of Errors and Appeals of New Jersey.

## REPLY BRIEF FOR APPELLANT

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*Counsel for Appellant.*

# Supreme Court of the United States

**October Term, 1929.**

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| NEW JERSEY BELL TELEPHONE COMPANY, *Appellant*, vs. THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY, *Appellee*. | On Appeal From the Court of Errors and Appeals of New Jersey. |

## REPLY BRIEF FOR APPELLANT

### I.

We did not argue in our original brief, as the State's brief seems to imply in the discussion on pages 2 and 3, that this court can hold this tax invalid under the state constitution. We recognize that the decision of the state court upholding the validity of the statute and tax, in this case, forecloses, in this court, any question that might arise under the state constitution.

Our argument was that this court will determine for itself the nature and incidence of the tax, and will examine the state decisions for whatever light they may throw upon the matter. We pointed out that in a succession of many decisions handed down over a period of some twenty-five years, and not departed from until the decision in this case, the highest court of the state had held consistently that this and precisely similar taxes are license taxes, and as one of the grounds of decision had held that if the tax were a property tax it would vio-

late the state constitution. Our suggestion was, and is, that the fact that the state court has so held should have weight in the minds of this court in support of our contention that this is not a property tax.

## II.

The State's brief, page 1, calls attention to the fact that appellant's business is conducted entirely within the State of New Jersey, and the point is discussed in the brief on page 11, where it is pointed out that the gross receipts "contain nothing for the transmission of messages over lines outside of the state". This is true. We so stated in our original brief. It is also true that of the entire taxable gross receipts for the year here involved, amounting to $21,000,000, the portion derived from interstate business is approximately $5,000,000. There is no issue about this. The facts are stipulated and are shown on page 24 of the record. The fact that the business of appellant in interstate commerce is all done within the State of New Jersey is entirely without significance.

## III.

The State's brief seeks to sustain this tax upon the assertion that it is exacted by the state in consideration of four rights or benefits which appellant receives from the state (enumerated and discussed on pp. 8 to 10 of appellee's brief) namely (1) the right of eminent domain, (2) the right to occupy the streets with its poles, wires, etc., (3) the benefit of being a regulated monopoly and

(4) the element of "going concern value". Appellee's brief says at page 10:

> "All of these four rights and benefits are bestowed by the state upon appellant solely in consideration of the taxes sought to be imposed by this act."

If the statement just quoted means nothing more than to say that the rights and privileges which a corporation has are derived from the laws of the state of incorporation, and that all taxes by the state are to be deemed compensation to the state for these rights and privileges, we may, for the purposes of this case, concede it; nevertheless, the state must proceed within the limits of the provisions of the federal constitution and must exercise its admitted powers of taxation in a lawful manner.

But if the contention of appellee is, as we understand it to be, that the gross receipts tax here in question is levied in consideration of the four enumerated rights or benefits, we find no basis whatever to support it. It is pure speculation of counsel for the state. We submit that counsel may not thus speculate as to what the legislature intended or might have intended. It is not sufficient, in order to sustain a tax exacted of a corporation, to say that the tax is not greater than the value of some right or privilege enjoyed by the corporation at the hands of the state. The question is not what the right to condemn private property, to occupy the public streets, to be a regulated monopoly, or to function as a going concern, are worth to this company, or whether they are worth the amount of this tax, a million dollars a year. We may concede that these rights, being indispensable, are worth whatever price the state may see fit to charge for them.

There are two conclusive answers to the contention thus made by counsel for the state. The first we have already suggested, namely, that it does not appear, except by the assertion of counsel, that this tax was laid for or on account of these four rights or privileges. Counsel may not, and this court will not, speculate as to what amount or manner of tax the legislature of New Jersey might have imposed as compensation for such rights, if it had addressed itself to that problem. The second answer is that the tax, if laid for the exercise of these several rights and privileges, since it takes the form of a fixed percentage laid upon the gross receipts from the interstate commerce, is violative of the Commerce Clause, and hence beyond the state's power.

## IV.

Finally, the State in its brief (pp. 17 *et seq.*) points to the fact that different classes of property have been traditionally taxed by different methods, that there is no principle of law requiring an *ad valorem* basis for a tax, and that a tax measured by a percentage of gross receipts has long been a familiar and valid form of taxation. All of this is true, of course. The State may take a fixed percentage of gross receipts in lieu of taking a fixed percentage of the value of the property taxed, provided that, if interstate receipts be included, the one *tax* shall be equivalent to the other. The *rationale of the rule is that gross receipts are an index of the value of the property which produces them.* But where the reason of the rule fails the rule has no application. The State asserts that the gross receipts of this company are an index or measure of the value of the right to use the highways. This is simply untrue. The two things

are wholly unrelated. The gross receipts throw no more light on the value of the right to use the highways, separately considered, than they do on the value of the switchboards, or of any other indispensable part of the telephone property, separately considered. The State's brief points to our admission that without the right to use the highways the value of the entire property would be nothing. But that is equally true of the switchboards alone, or of the telephones alone. Yet no one would contend that the value of a fragment of the physical property, such as the switchboards, or the telephone buildings, or the lines, either in or off the streets, could be measured by the gross receipts from the entire property, for purposes of taxation, and taxed at a fixed rate of such gross receipts in lieu of other property taxes. The same is true as to the property right in question, the right to use the highways. There is no distinction.

Where interstate commerce is involved, the State may not use an arbitrary basis as the measure of a tax that is levied in lieu of the ordinary property tax. It is not arbitrary to use the gross receipts derived from the entire property as an index or measure of a tax upon the entire property, because there is a measurable relationship between the property values and earnings. There is no such relationship between the measure here employed and the thing taxed, and the tax is, therefore, purely arbitrary.

Respectfully submitted,

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LEONARD A. SWENEY,
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IN THE

# Supreme Court of the United States

No. 254.

OCTOBER TERM, 1929.

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NEW JERSEY BELL TELEPHONE COMPANY,
*Appellant*,

*vs.*

THE STATE BOARD OF TAXES AND ASSESSMENT OF THE STATE OF NEW JERSEY,
*Appellee*.

---

**On Appeal from the Court of Errors and Appeals of New Jersey.**

---

## BRIEF FOR APPELLEE.

---

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## BRIEF FOR APPELLEE.

### (b) and (c)

Reference to the official report of the opinions delivered in the Court below and a statement of the grounds on which the jurisdiction of this Court is invoked are stated on page 1 of appellant's brief.

### (d)

The statement of the case contained in appellant's brief is correct except for the following additions which we deem pertinent to the argument.

1. Appellant's business is conducted entirely within the State of New Jersey (R. 17).

2. Appellant was incorporated August 12, 1904 (R. 3, 5, 7) as Delaware and Atlantic Telegraph and Telephone Company, which conducted a telephone business in the southern part of the State. On or about October 1, 1927, its name was changed to New Jersey Bell Telephone Com-

pany (R. 10), when it purchased and assumed all the property, franchises and business of the New York Telephone Company (R. 9, 12) in the northern and central areas of the State (R. 9). From that time forward appellant, in its present name and as the successor of both companies has conducted a telephone business throughout the State of New Jersey.

## (f)

## SUMMARY OF THE ARGUMENT.

1. *The Tax in question imposes no burden on interstate commerce in violation of the commerce clause of the Constitution of the United States.*

## ARGUMENT.

**The question of the validity of the act in question, and of the tax assessed thereunder, under the Constitution of New Jersey, cannot be argued in this Court.**

At pages 12, 13, 17 and 18 of appellant's brief it is argued that if this is a property tax, it violates the provisions of Article IV, Section VII, Paragraph 12, of the Constitution of New Jersey.

The reasons for setting aside the assessment, assigned by appellant upon a writ of certiorari before the New Jersey Supreme Court (R. 16 and 17) alleged only that said tax imposed a burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

The opinion in the Supreme Court states:

> "The sole reason assigned for setting aside the tax was the method, by which the amount of the tax was computed. The allegation is, that in so far as it is based in part upon gross receipts derived from interstate commerce, it is a regulation of, and burden upon interstate commerce, in violation of

Article One (1), Section Eight (8), Paragraph Three (3), of the Constitution of the United States." (R. 23, 24.)

The notice of appeal from the judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals (R. 28 and 29), specified only the same question.

The judgment of the Supreme Court was unanimously sustained by the Court of Errors and Appeals in a *Per Curiam* opinion, for the reasons expressed in the opinion delivered in the Supreme Court (R. 30).

This question was not raised in, or considered by, either of the courts below, and is not raised in the assignment of errors on the appeal to this court (R. 32, 33).

It is the settled rule that this court will not consider, on appeal, questions not raised in, or considered by, the court below.

> *White River Lumber Co.* v. *Arkansas,* No. 101, October Term, 1928, decided May 27, 1929, United States Supreme Court Adv. Op. (June 15, 1929), pages 512, 515.

Appellant therefore cannot be heard in this court to argue that either the act or the tax in question is in violation of the Constitution of New Jersey.

If, however, the Court should consider this question to be vital on this appeal, it may defer decision of the federal question and refer the case back to the New Jersey courts for decision of the question under state law.

> *Missouri, ex rel., Wabash R. Co.* v. *Public Service Commission,* 273 U. S. 126, 130.

**The tax in question imposes no burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.**

The assignment of errors (R. 32 and 33), while three in number, raise but one question, namely:

Whether the tax involved in the case imposes a burden upon interstate commerce in violation of the commerce clause of the Constitution of the United States.

The appellant was incorporated under an act entitled—"An act to incorporate and regulate telegraph companies," approved April 9, 1875 (Revision of 1877, p. 1174) and also under an act entitled "An Act concerning corporations" (Revision of 1896) approved April 21, 1896 (P. L. 1896, p. 277) and their various supplements and amendments, respectively, with full power to erect and maintain the necessary poles, wires, conduits and other fixtures in, upon, along, over or under any street or public place upon obtaining the consent of the owner of the soil and the local authorities, and through, across or under any of the waters within the state without any consent, and upon, through, or over any other land upon payment of compensation to the owner. The power of eminent domain was conferred. It has since acquired, either directly or through subsidiary or predecessor companies, many theretofore existing franchises to use public streets.

As originally passed, the act of 1875 applied only to telegraph companies, but its application was extended to telephone companies by an amendment (P. L. 1890, p. 491).

Section 5 required such companies to pay to the state an annual tax of one-half of one per cent. upon the amount of their capital stock. (Revision of 1877, p. 1175.)

From the time of the enactment of the act of 1875, until 1884 telephone companies paid three different forms of taxes:

1. A capital stock tax of one-half of one per cent. to the state.

2. An *ad valorem* tax on its tangible property in each municipality.

3. Such amount as they agreed to pay to the municipalities for the special franchise to use the streets and public places.

By an act entitled—"An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884 (P. L. 1884, p. 232), telegraph and telephone, and certain other public utility companies were required to pay a franchise tax, measured by 2% of gross receipts, to be ascertained and determined in a manner substantially similar to that provided in the Act of 1900, in lieu of the tax of one-half of one per cent. on capital stock.

Prior to the enactment of the Act of 1900 corporations, like the appellant, using the public streets for their facilities, in order to obtain the municipal consents for the erection and maintenance of their lines in the street, were required to pay to the municipalities direct such reasonable amounts therefor as they were able to agree with the municipaiities.

*Jersey City* v. *Jersey City and Bergen Ry. Co.*, 70 N. J. L. 360;

*Eatontown* v. *Monmouth County Electric Co.*, 78 N. J. L. 493.

If the objections to the tax which the appellant now makes are valid, they were equally valid against either or both of the previous methods employed and to which the appellant, and its predecessors in interest have sub-

mitted without question since 1884. These taxes upon special or exclusive rights within the streets have been held by New Jersey courts not to be within the scheme of the law taxing tangible property, but to be imposed upon the right of enjoyment of special privileges in the streets, and justified by reason of that enjoyment.

*Jersey City* v. *North Jersey Street Ry. Co.*, 74 N. J. L. 774;

*Atlantic City and S. R. R. Co.* v. *State Board*, 88 N. J. L. 219;

*Newark* v. *State Board*, 67 N. J. L. 246.

By the act of 1900 (P. L. 1900, p. 502, as amended P. L. 1917, p. 42) the property of the appellant is divided into two classes.

(a) Real and personal (tangible property).

(b) Franchises (intangible property).

The real and personal, or tangible property, whether located in the public streets or on private property, is assessed locally in each municipality in the same manner and at the same rates as all private property, and the tax is paid to the municipality (Section 2, P. L. 1900, p. 502).

The real and personal property so assessed consists of physical objects, including land, buildings, fixtures, poles, brackets, cross-arms, insulators, wire, etc., and the amount of the assessment represents the true or intrinsic value of these naked elements existing within the municipality.

The stipulated record herein expressly states that no intangible property was assessed locally and that all intangible property is included in the tax in dispute (R. 18, pgf. 4).

The local assessors report to the County Board of Assessors and it, in turn, reports to the appellee, the value, so assessed, of that portion of the aforesaid tangible property located in or upon or under any street or public

place (Section 3, P. L. 1900, p. 502, as amended P. L. 1918, p. 907). The appellant is required on or before February 1, of each year, to make a report to the appellee of the gross receipts of its business over, on, in, through or from its lines in the State for the year ending the preceding December 31st, together with a statement of the length of its whole line and the length of its line along any street, highway, road, lane or other public place. The appellee then assesses upon the appellant a tax measured by 5% of the amount of such proportion of such gross receipts as the length of its line along, in, on or over any such street, highway, road, lane or other public place bears to the length of the whole line in the State (Section 4, P. L. 1900, p. 502, as amended by P. L. 1927, p. 567).

This tax is then apportioned and distributed to the various municipalities (or taxing districts) in proportion to the value of the appellant's tangible property located in, upon or under any public street, highway, etc., therein as shown by the statements filed with the appellee (Section 6, P. L. 1900, p. 502, as amended P. L. 1927, p. 567).

The Act of 1900 substituted for the three previously existing forms of taxation, two forms, as follows:

1. A tax on tangible property, both real and personal, within the municipalities or taxing districts assessed locally at the local rate for all private property.

2. A tax, measured by 5% of the gross receipts, to cover all franchises or intangible property, such as:

(a) the franchise or privilege of being a corporation,

(b) the *special* franchise or privilege of occupying streets and public places,

The act expressly declares this tax to be in lieu of all other franchise taxes, and that all payments to municipalities under previous special franchise agreements for

the use of streets shall be credited on the amount of the tax assessed under this act (Sec. 7, P. L. 1900, p. 504). It therefore clearly appears that the Legislature expressly intended that the special franchise to occupy and use the public streets, which is a property right, was to be taxed under this act and that the measure of the tax therein prescribed should include the tax thereon. It is clearly not an occupation tax, since it is not measured by *all* of the gross receipts of the appellant.

It is worth while to consider in detail what this intangible property includes.

1. The right of eminent domain, which is not enjoyed by the corporations who pay only a franchise tax for the privilege of being a corporation.

2. The right to tear up and occupy the public streets by digging trenches to lay and repair conduits, or for the erection and maintenance of poles and wires. These structures become fixtures in and under the streets and occupy a portion of the street to the exclusion of other public use.

3. The benefit of the public policy of the State of New Jersey to have a regulated monopoly of its business within the territory served.

Section 24 of an act entitled, "An act concerning public utilities; * * *," approved April 21, 1911 (P. L. 1911, p. 374), provides as follows:

> "No privilege or franchise hereafter granted to any public utility as herein defined (including telephone companies), by any political subdivision of this State shall be valid until approved by said Board, such approval to be given when, after hearing, said Board determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests * * *."

It has been held without variation that thereby the Legislature of New Jersey adopted the policy of regulated monopoly in substitution for competition in public utility service.

*Re Atlantic Highlands Gas Co.*, 1 N. J. Pub. Util. Com. Rep. 7;

*Re Consumers Gas Co.*, 1 N. J. P. U. C. Rep. 650;

*Re Eastern Telegraph Company*, 1 N. J. P. U. C. Rep. 733;

*Re Phillipsburg Light, Heat and Power Company*, 2 N. J. P. U. C. Rep. 379;

*Re Patrons Telephone Company*, 2 N. J. P. U. C. Rep. 456;

*Re Jersey Power Company*, 2 N. J. P. U. C. Rep. 463;

*Re New Jersey and Pennsylvania Traction Co.*, 4 N. J. P. U. C. Rep. 351;

*Re Lakewood and Coast Electric Company* v. *Atlantic Electric Light Co.*, 4 N. J. P. U. C. Rep. 540;

*Re Peoples Water Company*, 5 N. J. P. U. C. Rep. 126;

*Re Morris and Somerset Electric Company*, 10 N. J. P. U. C. Rep. 322.

This policy has also been sustained by the Courts of New Jersey.

*Hunter* v. *Board of Public Utility Commissioners*, 1 N. J. Miscl. Rep. 408; 141 Atl. 90.

4. The additional value of the naked physical elements, assembled and co-ordinated into a functioning institution ready for and actually engaged in business, known as "going concern value," which, though intangible, is nevertheless substantial.

None of these four rights or benefits belong to corporations organized under the general corporation act, who pay a license tax solely for the privilege of existing in unity and perpetuity as a corporation.

All of these four rights and benefits are bestowed by the State upon appellant solely in consideration of the taxes sought to be imposed by this act.

The privileges which the appellant enjoys are not like those of the bus companies, whose cases have been before this court. The buses use the highways in common with other persons. Their equipment is transitory—it passes along the highways from one state to another and occupies a given space only momentarily. They have no permanent or exclusive privileges. Yet this court held that even they could be required to pay some tax for the use of the improved highways. Here, the equipment of the appellant is fixed and permanent in the highways, and it has an exclusive privilege.

It is true that the act calls this a "franchise" tax, but it is obviously not merely a "license" tax. It is more than that. It is a tax on the property value of a special franchise of privilege to enjoy all these benefits which other corporations who pay only a "license" tax for the mere privilege of being corporations do not enjoy. The generic name given to the tax on intangible property is to distinguish it from a tax on tangible property, rather than an attempt to classify it for judicial purposes.

In *Postal Tel. Cable Co.* v. *Adams*, (155 U. S. 688) this court held that the tax there involved was a property tax, even though the act in question expressly called it a privilege tax.

This is not a tax *upon* the gross receipts. It is a tax, in lieu of a direct property tax, upon substantial and valuable property rights which may be sold or assigned

for value and were, in part, sold for value in 1927 by the New York Telephone Company to the appellant.

The tax in question, measured by 5% of gross receipts (including those from interstate messages) has been applied to appellant in the same manner as now complained of for the past 25 years and this is the first time that it has raised the question, or contested the tax on this ground.

Appellant is authorized to do business only in New Jersey.

All of its property, equipment and franchises are within that State (R. 17, pgf. 2). It transacts no business and carries no messages outside of the State. All interstate messages over its lines in New Jersey are received from or delivered to connecting companies in the adjoining states at the state boundary. Its gross receipts, as reported to the appellee, and involved in this case, (including those from interstate messages) are limited to compensation for service rendered on its line within the State (R. 18, pgf. 5). The remainder of the toll charges on interstate messages go to the connecting lines. Its revenues, therefore, contain nothing for the transmission of messages over lines outside of the State.

The present tax is not directed at gross receipts from, or intended to affect, interstate commerce. The effect, if any, upon interstate commerce is purely incidental and indirect.

Out of the 15,203 miles of appellant's line in New Jersey, 8,403 miles (more than half) are in the public streets (R. 13).

Without the privilege of using the streets, appellant would be required to purchase, maintain and pay local taxes on 8,403 miles of additional private right of way and pay interest (probably 6%, at least) on the cost thereof.

In 1928 the average of the local tax rates on such property throughout the State was 3.877% of true value (Fitzgerald's Legislative Manual, N. J. 1929, p. 293).

In substance, there is no difference between a tax, measured by 5% of the gross receipts, on the intangible property of appellant in the 8,403 miles of its line in the streets and the tax at local rates on the 6,800 miles on private right of way. Both, alike, carry interstate messages. If interest on the cost of 8,403 miles of private right of way, in place of the 8,403 miles now in the streets, was included, the mileage in the streets would show a distinct pecuniary advantage over that on private right of way.

The result is that instead of the method of taxation in question being a burden upon interstate commerce (to the extent, if any, that it may be indirectly affected thereby), it confers a benefit, or bounty, in actual dollars and cents, upon such commerce.

The objection is that this tax is measured by the gross receipts. The gross receipts of utility companies is a measure of taxation quite uniformly adopted among the states. It was first adopted in New Jersey in 1884 and has ever since been applied to appellant and its predecessors in interest, without objection or complaint. It is a just measure for determining taxes. By way of illustration, consider two telephone companies, each with a capital stock of $1,000,000. One is in a populated section where its customers are numerous and it is thereby able to realize gross receipts of $100,000 a year. The other company is not so favorably situated and is able to realize gross receipts of only $10,000 per year. If they were both taxed under the Act of 1895, at one-half of one per cent. on their capital stock, each would pay $5,000 taxes. This would amount to 5% of the gross receipts of the first company and 50% of the gross receipts of the second company. While these figures are arbitrary, they nevertheless

serve to illustrate the justice of a tax measured by gross receipts.

It was the desire of Legislature to take the fat with the lean (service in the lean territory being as essential to society as service in the fat territory) and establish a tax that would do justice to economic conditions and necessities. Gross receipts in this case, as in many others which this court has considered, is the *measure* and not the *subject* of the tax.

While the opinion of the New Jersey Supreme Court (R. 23, 27, incl.) cites and follows the case of *Phillipsburg, etc.* v. *Bd. of Assessors* (82 N. J. L. 49; 99 N. J. L. 319, affirmed 101 N. J. L. 225), it expressly states that:

> "Quite independent of that case, we think the method adopted by the State Board of Taxes and Assessment in the instant case was not illegal and not in violation of the commerce clause of the United States Constitution, but in harmony with the decisions of the United States Supreme Court the ultimate authority on the point here involved" (R. 26).

The decisions of this court therein cited and relied upon are: *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194; *Cudahy Packing Co.* v. *State of Minnesota*, 246 U. S. 450.

The Supreme Court followed Mr. Justice Van Devanter's opinion in the last mentioned case in holding that the tax in question—

> "was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as an index or measure of the value of the property for taxing purposes. * * * The method adopted for calculating the tax, viz., by gross earnings being taken merely as a measure of the value of the franchise of the prosecutor."

For these reasons the tax in question was affirmed and judgment entered thereon dismissing the writ of certiorari (R. 27).

By unanimous decision of the Court of Errors and Appeals (the court of last resort in New Jersey) the judgment of the Supreme Court was affirmed for the reasons expressed in that opinion (R. 30).

Appellant's brief proceeds on the erroneous assumption that the terms "franchise" and "license" are synonymous and that a franchise is nothing more than a license to exist as a corporation. It states (at p. 23):

> "Of course, there is no difference in principle between a tax imposed by a state or a municipality for the privilege of engaging in a certain business and a tax, such as the case at bar, imposed for the privilege of using the public street and highways. In either case, the tax is a *license* tax as distinguished from a *property* tax."

In *Jersey City Gas Co.* v. *Dwight,* 29 N. J. E. 242, the New Jersey Court of Chancery held that the right of a company to place its poles, string its wires, etc., in the public streets is a special franchise; that such a franchise is an incorporeal right. Such a special franchise was distinctly recognized by this court in *State Railroad Tax Cases,* 92 U. S. 573.

By virtue of its incorporation under the General Corporation Act (P. L. 1896, p. 277), appellant acquired the franchise or license to exist as a corporation in perpetuity.

The statutes of New Jersey recognize another and a different franchise in the right to use streets or public places, as indicated by those limiting the period for which such a franchise may be granted (P. L. 1906, p. 50, and supplements and amendments). The appellant acquired all of its franchise to use the public streets prior to the enactment of the Act of 1906 and therefore enjoys them in perpetuity.

That these two separate and distinct forms of franchise exist is recognized by all of the authorities.

The franchise of being a corporation and enjoying a unity and perpetuity of existence, is, under our general corporation laws, a right available to any group of persons. It has no property value because it is available to all and it cannot be separately assigned or sold for value. It belongs to the stockholders and not to the corporation itself. This is properly a "license" and may be taxed by the State which creates the corporation, regardless of where the business of the corporation may be conducted.

The special franchise consists of such special rights and privileges as the right of eminent domain, the right of partial appropriation and exclusive use of public property. This is a right belonging to the corporation and may be transferred, sold, or mortgaged for value. It has a definite capacity to earn money. Without it the appellant, even though it had the license to be and exist as a corporation, could not function as a public telephone company.

Appellant admits (at p. 33 of its brief):

> "It would probably be correct to say that a telephone system could not exist at all, as a practical matter, without the right to run the lines through the streets. This right being indispensible, a *sine qua non,* the property might be said to have *no value without that right.*" (Italics ours.)

The license to be a corporation may be forfeited for failure to file annual reports or to pay taxes, but its special franchises survive in the stockholders as property rights, and can be sold with other property to a successor.

In *Thompson* v. *Schenectady Ry.,* 124 Fed. 274, it was held that such a right of a street railway company was real estate. In other cases it has been held to be an easement; an interest in reality; an incorporeal hereditament.

*Detroit Citizens St. Ry.* v. *Detroit,* 64 Fed. 628 (635, 643);

*Detroit Citizens St. Ry.* v. *Common Council,* 125 Mich. 673;
*Knoxville* v. *Africa,* 77 Fed. 501;
*Milhau* v. *Sharp,* 27 N. Y. 611;
*People* v. *O'Brien,* 111 N. Y. 1;
*Jersey City* v. *Dwight,* 29 N. J. E. 242.

That this right is not a mere license but a grant of a property right, assignable, taxable, alienable for value, and of substantial legal value is held by the courts of New Jersey in

*State Board* v. *Central R. R. Co.,* 48 N. J. L. 146;
*Hudson Telephone Co.* v. *Jersey City,* 49 N. J. L. 303;
*Newark* v. *State Board,* 67 N. J. L. 246;
*Public Service Co.* v. *Board of Public Utility Comm'rs,* 84 N. J. L. 463,

and by this court in

*Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58;
*Boise Artesian Water Co.* v. *Boise City,* 230 U. S. 84;
*St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92.

The appellant has acquired this valuable and substantial property right from the State without any consideration whatever to the State, except the reciprocal right of regulation and taxation. It ought not to be permitted, by the voluntary use for the transmission of interstate messages, of rights and privileges granted to it solely for the use of intrastate messages, to thereby escape taxation of the full value such rights and privileges.

If the State should attempt to assess an *ad valorem* tax on these property rights in the streets, how would it ascertain the value thereof from year to year? A tax per pole or mile of line would be entirely arbitrary, and in-

accurate. A telephone line in the country may have just as many poles and miles of wire to the mile of distance as a line in the city, yet the city line would undoubtedly be more valuable because it would earn the most money. By using gross receipts as the measure of the value of the property right a uniform system of taxation at a true value is attained. By this method this property is assessed by uniform rules according to its true value.

It is not necessary that all property be taxed on an *ad valorem* basis, or on any other basis. From the beginning, different classes of property in New Jersey have been taxed by different methods. In fact railroad property is, and for many years has been, assessed by three different methods, applicable to first, second and third class property, respectively. All of these different methods, including the one in question, have been repeatedly sustained by the New Jersey courts against challenges of their constitutionality. It is sufficient if all property of the *same class* is assessed by uniform rules according to its true value.

*State Board* v. *Central R. R. of N. J.*, 48 N. J. L. 146.

It is declared in *Cook on Corporations* (6th Edition, Volume 2, Section 572d, p. 1576):

> "It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered with. (Citing *Western Union Telegraph Co.* v. *Taggert*, 163 U. S. 1.) A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears toward the whole property. This is not interfering with interstate commerce by levying a tax for the privilege

of transacting such commerce. (Citing *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185.)"

The method employed under the Act of 1900 for the taxing of appellant's intangible property, *i. e.*, its property rights in the streets, is substantially similar to the method sustained by this court in

*Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217;

*United States Express Co.* v. *Minnesota*, 223 U. S. 335.

Congress, in its regulation of interstate commerce, has never entered the field of property taxation. Are the states, who provide these admittedly indispensable property rights, in addition to the mere right to be a corporation, to be deprived of the sovereign right to tax, when the reasonableness of the tax itself is not questioned in the record? The effect of such a construction of the Act of 1900 would be to exempt this valuable property from taxation altogether. There can be no presumption of a tax exemption. On the contrary no property will be presumed to be exempt unless expressly so declared by the Legislature.

*The decisions of this court.*

There is no decision of this court on a state of facts such as we have here. In none of its decisions was there involved the question of the property right of the company to use the public streets.

Out of the numerous decisions which have been rendered involving taxes measured by a percentage of gross receipts, two well marked lines appear.

In *Philadelphia and Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Galveston, Harrisburg and San Antonio Ry.* v. *Texas*, 210 U. S. 217, and *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298, such a tax was declared to be invalid because, in each of those cases, it was assessed directly upon the business or gross receipts of the companies

and was not in substitution for or in lieu of any other tax. In each of those cases all the property of the companies, tangible and intangible, was assessed by other methods.

In *Maine* v. *Grand Trunk R. R.*, 142 U. S. 217; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, and *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450, this court sustained such a tax, measured by a percentage of the gross receipts from both interstate and intrastate commerce, because it was not levied directly upon the commerce or the gross receipts, and was a tax in lieu of other taxes on the company's property.

The act here in question prescribes a tax, measured by a percentage of the gross receipts, upon all intangible property *in lieu of all other taxes thereon.* It is not a tax upon the act of engaging in business or a tax upon the commerce, or upon the gross receipts, as such. On the contrary it has a substantial basis upon the intangible property of the company represented by the special franchises and exclusive rights already mentioned, which are otherwise untaxed. These special franchises and rights are *property* which is a part of a system located entirely within the State of New Jersey, and which substantially augments the value of that system and of its connected operation as a whole, and the tax in question is an appropriate means of reaching its full value as a going concern, within the rule stated in *Pullman Company* v. *Richardson*, 261 U. S. 330.

## CONCLUSION.

It is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey should be affirmed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

No. 254.—October Term, 1929.

New Jersey Bell Telephone Company, Appellant, *vs.* The State Board of Taxes and Assessment of the State of New Jersey. } Appeal from the Court of Errors and Appeals of the State of New Jersey.

[January 6, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

In 1928 appellee made an assessment against the appellant under a law of New Jersey known as the Voorhees Franchise Tax Act. Appellant caused the assessment by writ of certiorari to be brought to the supreme court of the State and there insisted that as construed the statute is repugnant to the Commerce Clause. That court held the law valid, sustained the tax and dismissed the writ. —N. J. L. —. And its judgment was affirmed in the court of errors and appeals. — N. J. L. —.

As stated in its title, the Act is one "for the taxation of all the property and franchises of persons, copartnerships, associations or corporations [hereinafter referred to as taxpayers] using or occupying public streets, highways, roads or other public places . . ." (hereinafter referred to as streets).[1] Section 1 provides that "all the property, real and personal, and franchises, of" taxpayers who have the right to use or occupy streets shall be valued, assessed and taxed as provided in the Act. Section 2 directs that the respective assessors "shall each year ascertain the value of such property located in, upon or under any public street . . . in each taxing district, and the value of the property not so located; when so ascertained, all such property shall be assessed and taxed at local rates, as now provided by law . . ." And § 3 requires the valuation of all property located in streets to be reported by districts to county boards and by them to appellee.

[1] P. L. 1900, p. 502, as amended by P. L. 1902, p. 476, P. L. 1917, p. 42, P. L. 1918, p. 907, and P. L. 1927, p. 567.

Section 4 provides that all such taxpayers shall return each year to appellee a statement showing the gross receipts of their business in the State for the calendar year next preceding, and that "the franchise tax of such person, copartnership, association or corporation for business so done in this State" shall be upon such proportion of gross receipts as the length of the line or mains in the streets bears to the length of the whole line or mains. Section 5 prescribes the rate. It was 2 per cent. prior to the amendment of 1917, but that Act increased it to 3 per cent. for 1918, to 4 per cent. for 1919 and to 5 per cent. for 1920 and each year thereafter.

Section 6 requires appellee to apportion the franchise tax among the taxing districts on the basis of the locally assessed value of the taxpayer's property in the streets in each district to the total value of all its property so located. The amounts so apportioned are collected as are other taxes. Section 7 enacts that money paid to a tax district pursuant to contract shall be considered a payment on account of the franchise tax imposed by the Act, and § 8 declares that the franchise tax shall be in lieu of all other franchise taxes assessed against such taxpayers and their property.

Appellant is a corporation organized under the laws of New Jersey and has long carried on a telephone business there. All its lines and property are within that State. October 1, 1927, it succeeded to the property and business in that State of the New York Telephone Company. A supplementary Act approved March 27, 1928, required that company's gross receipts in New Jersey in 1927 to be included for the calculation of the franchise tax assessed against appellant. P. L. 1928, p. 223. Each company furnished intrastate telephone service in New Jersey, and also had large receipts for transmission of messages, passing over its lines in that State and other companies' connecting lines, between places in New Jersey and places in other States and countries. The service so rendered in New Jersey in respect of such interstate and foreign commerce is for brevity called interstate business. Appellant's telephone plant in New Jersey included large amounts of real and personal property which was assessed and taxed locally. The average of the local rates in 1918 was 3.877 per cent.[2] The record does not disclose the assessed value of appellant's property.

[2]Fitzgerald's Legislative Manual, N. J. 1929, p. 293.

The gross receipts of both companies from business in New Jersey in 1927 was $40,280,332.95. Each received from its interstate business in that State between 23 and 24 per cent. of its total. The New York Telephone Company had 10,829 miles of line in New Jersey of which 5,516 were in streets. And the appellant, after the acquisition of the property of the other company, had 15,203 miles, of which 8,403 were in streets. The franchise tax assessed in 1928, calculated as required by the Act, amounted to $1,058,997.85. Appellant paid so much of the tax as was based on its intrastate earnings. The controversy in this case concerns only the 5 per cent. of gross receipts derived from interstate commerce.

The court of errors and appeals rested its decision on the reasons given by the supreme court. The latter declared itself bound to follow a former decision (*Phillipsburg R. R. Co.* v. *Bd. of Assessors*, 82 N. J. L. 49) which, construing a like statute taxing street railways, held that the tax was not levied on gross receipts or business but was "merely an excise tax", measured in part by gross earnings, on its franchise to exist as a corporation and its franchise to occupy the streets and that it was not repugnant to the Commerce Clause. Dealing with the tax here involved, the court held it is a tax on property, "earnings being taken merely as a measure of the value of the franchise of the prosecutor."

Appellant contends that the exaction is a license tax levied directly on gross receipts from interstate as well as intrastate commerce in addition to ad valorem taxes upon its real and personal property and that therefore the Act is repugnant to the Commerce Clause.

Appellee insists that the franchise is intangible property which includes power of eminent domain, right to occupy the streets, going concern value and the benefit of the state policy to have a regulated monopoly. It alludes to Art. IV, § VII, par. 12, of the state constitution: "Property shall be assessed for taxes under general laws and by uniform rules according to its true value"; and argues that, by using gross receipts as a measure of value of the property right, a uniform system of taxation at a true value is attained; that the franchise tax is not upon business, commerce or gross receipts as such.

It is elementary that a State may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a State may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end. *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338, and cases cited. *Sprout* v. *South Bend,* 277 U. S. 165, 171. This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon.

The language of the Act and the decisions of the courts of the State are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business. *Galveston, Harrisburg, &c. Ry. Co.* v. *Texas,* 210 U. S. 217, 227. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 401. *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625.

The franchise tax upon gross earnings does not purport to be and is not claimed as a charge or rental for the use of property belonging to the State or any of its subdivisions. Indeed the appellee insists, and rightly so, that the right to construct, maintain and use mains and lines in streets is property owned by appellant; and it argues that the percentage of gross earnings exacted is a tax on that property right. Clearly the State, when passing the Act making the assessment acted, not as a proprietor demanding compensation for the use of its property, but as sovereign imposing a tax for the support of government. Cf. *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92, 97.

In the title and throughout the Act the distinction is made between the tax on property and the franchise tax on gross receipts. The levying provision (§ 5) defines the exaction as a "franchise tax upon the annual gross receipts" and elsewhere in the Act it is referred to briefly as "franchise tax". All real and

personal property is required to be taxed by districts at local rates according to value; the franchise tax is a percentage of gross receipts; and it is declared to be in lieu, not of any property tax, but of all other franchise taxes.

And, as under the state constitution, property is required to be assessed by uniform rules according to its true value, the legislature may not reasonably be deemed to have intended direct valuation and assessment of some of the property at local rates and the measurement of the value of other elements of the plant by percentage of gross earnings increasing on a sliding scale from 2 per cent. in 1917 to 5 per cent. in 1920 and thereafter. *North Jersey St. Ry. Co.* v. *Jersey City* (Supreme Court) 73 N. J. L. 481; (Court of Errors and Appeals) 74 N. J. L. 761.

While the ground on which the supreme court put its decision in this case does not clearly appear, it is certain that in a number of earlier decisions, the first of which was in 1906, the franchise tax upon gross earnings was held by the courts of the State to be a license fee tax and not a property tax. *North Jersey St. Ry. Co.* v. *Jersey City, supra. Bergen Aqueduct Co.* v. *State Board,* 95 N. J. L. 486. *Eastern Penna. Power Co.* v. *State Board,* 103 N. J. L. 281. And see *Phillipsburg R. R. Co.* v. *Bd. of Assessors, supra.* There is no decision to the contrary unless it is this case. Moreover, the preservation of the distinction between the tax on property and the franchise tax on gross receipts in amendatory Acts passed after the highest court of the State held the latter to be a license fee strongly suggests that the legislature intended the meaning of the Act to be as construed.

And the prescribed basis of apportionment of gross earnings is clearly inconsistent with the taxation according to its true value of appellant's right to use the street for its lines. The telephone property used to render the service from which the earnings are derived includes the lands, buildings, equipment, etc., as well as its lines; and material and labor for operation and maintenance are also required. The assumption underlying the prescribed rule is that, in respect of service and earnings per mile, mains and lines in streets are the same as, or fairly comparable with, the other mains and lines. But it is well known that one stretch of line may consist of only a pair of wires while another stretch may

carry many. The property in the streets was directly taxed by districts at $41,189,804.00. Assuming, as appellee contends, that these assessments did not include the value of appellant's right to use streets, it would be without rational basis and arbitrary to use a mileage proportion of gross earnings to measure the value of the privilege or easement in question. And the amount of the franchise tax upon gross earnings was the equivalent of a tax at the average rate on property of value in excess of $27,000,000. That would assign to the naked right to use streets for telephone mains and lines more than $3200 per mile. There has been called to our attention no precedent for the use of gross earnings as a measure of the value of a single element of such a plant. The elements of value resulting from appellant's power of eminent domain and possession of going concern and of a regulated monopoly cannot reasonably be deemed to be the sole or even a distinct source of the gross earnings by which the tax is measured. We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this Court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void. *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 336, 345. *Galveston, Harrisburg, &c. Ry. Co., supra*, 217. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298. *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295, 297. *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, 329. *Pullman Co.* v. *Richardson, supra.*

*Judgment reversed.*

Mr. Justice STONE took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES.

No. 254.—October Term, 1929.

New Jersey Bell Telephone Company, Appellant, *vs.* The State Board of Taxes and Assessment of the State of New Jersey. } Appeal from the Court of Errors and Appeals of the State of New Jersey.

[January 6, 1930.]

Mr. Justice Holmes.

The appellant, a New Jersey corporation, has a part of its lines in and over New Jersey roads and other public places, and transmits over them messages to places both within the State and outside. For allowing this privilege the State charges a price in the form of a tax of five per cent on such proportion of the gross receipts from all the work done in the State as the lines in the public places bear to the total lines in the State. There are no lines outside. The lines in public places are more than half the total lines. The interstate business is less than a third of the intrastate. I think the tax constitutional. I call it the price for a privilege, because that is what the Courts of the State pronounce it to be. *North Jersey Street Ry.* v. *Jersey City*, 73 N. J. L. 481, 484; 74 N. J. L. 761, 763, 765, because on the statutes I think it plainly to be such, and because a statute must be assumed to rest on any and every ground that will support it, except so far as excluded by specific facts.

What then is to hinder New Jersey from charging a reasonable price for something that the appellant cannot have without her consent? It is said that the hindrance lies in the fact that a part of the burden falls on interstate commerce. I am content to assume that if the State were attempting to discriminate against such commerce and using its right as a disguise, the attempt would fail. A right specifically protected by the Constitution may become a wrong when used to carry out an unlawful scheme. But

there is nothing of that sort here. The tax is in lieu of all other taxes on intangible property, which the privilege is held to be in New Jersey. The reference to gross earnings to ascertain the value is legitimate. *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450. The proportion is prima facie reasonable, especially in view of the proportions between the lengths of the lines and between state and interstate business. It fairly may be supposed that the lines over the streets do their full share of the work. Furthermore the only objections to the tax raised in the record by the appellants are objections to the tax as a whole in so far as it may touch receipts from interstate business, not to the proportion adopted. And so I think that the incidence of a part of the tax on interstate commerce, if any such there be, "does not constitute a direct and material burden" upon it. *Hendrick* v. *Maryland*, 235 U. S. 610, 622; *United States Express Co.* v. *Minnesota*, 223 U. S. 335.

I do not think names of any importance to this case, and do not discuss whether the tax is to be called a property tax upon an easement, a franchise tax upon an incorporeal hereditament as it is called in New Jersey, a license tax, or by some other title. If the statute fixes a price for what the appellant needs the State's permission to use, I think it within New Jersey's constitutional power. "Even interstate commerce must pay its way." *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U. S. 252, 259.

Mr. Justice BRANDEIS agrees with this opinion.